TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 318

MAX HENKELS, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED MARCH 17, 1925

(30,959)

(30,959)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1925

Subpoena.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to Thomas W. Miller, as Alien Property Custodian, and Guy S. Allen, as Treasurer of the United States of America, GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in equity, by Max Henkels, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars ($250).

2

WITNESS, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 1st day of April, in the year one thousand nine hundred and twenty-one, and of the Independence of the United States of America the one one hundred and forty-fifth.

3

ALEX. GILCHRIST, JR.,
Clerk.

HIRSCH, SHERMAN & LIMBURG,
Complainant's Solicitors,
160 Broadway,
New York City.

4 *Subpoena.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, JR.,
Clerk.

(Seal)

Bill of Complaint.

5

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Complainant, against THOMAS W. MILLER, as Alien Property Custodian, and GUY S. ALLEN, as Treasurer of the United States of America, Defendants.	In Equity No. E 21-108.

6

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The complainant, Max Henkels, brings this, his bill of complaint, and respectfully shows to the Court:

FIRST: The complainant, Max Henkels, is a citizen of the United States of America, and is a

resident of the City, County and State of New York, and is not, nor at any time has he been, an enemy or the ally of an enemy of the United States within the meaning and purview of such terms as used and defined in the Trading with the Enemy Act, or in any act amendatory thereof or supplementary thereto, or in any proclamation or executive order issued by the President of the United States of America pursuant to the provisions of said Trading with the Enemy Act, or in any manner whatsoever.

SECOND: The defendant Thomas W. Miller is a citizen of the United States of America, and a resi- 8
dent of Washington, in the District of Columbia, and at all times since the 4th day of March, 1919, has been and now is the duly appointed Alien Property Custodian.

THIRD: The defendant Guy S. Allen is a citizen of the United States of America, and a resident of Washington, in the District of Columbia, and is the Treasurer of the United States of America.

FOURTH: That on and prior to the 18th day of June, 1918, one A. Mitchell Palmer was the Alien Property Custodian.

FIFTH: That on and prior to the 18th day of 9
June, 1918, complainant was the owner of 2,298 shares of the common capital stock of International Textile, Inc., a Connecticut corporation, of the par value of $100 each.

SIXTH: That on or about the 18th day of June, 1918, the said A. Mitchell Palmer, acting as such Alien Property Custodian, and claiming that such shares of capital stock were then owned by the co-

partnership of Alb. & E. Henkels, of Langerfeld, Germany, and that the said co-partnership Alb. & E. Henkels was an enemy within the meaning of the Trading with the Enemy Act, required complainant to transfer, assign and deliver the said shares, which then stood in the name of the complainant, to said A. Mitchell Palmer, as such Alien Property Custodian.

SEVENTH: That thereupon complainant, in compliance with said demand, did so convey, transfer and assign and deliver the said shares to said A. Mitchell Palmer, as such Alien Property Cus-
11 todian, and that at the time of such conveyance, transfer, assignment and delivery the complainant claimed and gave notice to the said Alien Property Custodian that the said shares were not the property of said co-partnership Alb. & E. Henkels, but were the sole property of complainant, and that complainant was not an enemy or the ally of an enemy, within the provisions of the Trading with the Enemy Act, as amended, or in any manner whatsoever.

EIGHTH: That at or prior to said conveyance, transfer, assignment and delivery complainant duly presented his petition to said A. Mitchell Palmer,
12 as such Alien Property Custodian, under and pursuant to the provisions of Section 7d of the Trading with the Enemy Act, requesting permission to deliver such shares of stock to him as such Alien Property Custodian, to be held, administered and accounted for as provided by law, preserving and reserving his rights thereto, and his claim that such shares or the proceeds derived from any sale thereof were his exclusive property, and to make any other claim thereto which he might be entitled to under the law; that the said petition was duly

granted by the said A. Mitchell Palmer in writing, and thereupon the said 2,298 shares were delivered by this complainant to the said A. Mitchell Palmer, as such Alien Property Custodian, under the circumstances hereinabove set forth, and not otherwise.

NINTH: That thereafter, and on or about the 26th day of March, 1919, the said A. Mitchell Palmer, as such Alien Property Custodian, sold the said 2,298 shares of stock, and the net proceeds of the sale thereof were paid over by him to the defendant Guy S. Allen, as Treasurer of the United States. 14

TENTH: That on or about the 2nd day of June, 1920, and before the commencement of this action, complainant duly made and filed with the Alien Property Custodian notice of his claim to the proceeds of the sale of the said 2,298 shares of stock in conformity with the provisions of Section 9 of the Trading with the Enemy Act, and duly made and filed with the Attorney General, in whom the President of the United States had vested all power and authority conferred upon the President, pursuant to the provisions of Section 9 of the Trading with the Enemy Act, his application for the allowance of said claim; that more than sixty days have 15 elapsed since the filing of such claim, and of such application for allowance thereof, and neither the President of the United States, nor the said Attorney General, has ordered the allowance thereof.

WHEREFORE, complainant prays for a decree herein ordering and adjudging:

(1) That the said 2,298 shares of the common stock of International Textile, Inc., be declared and decreed to be the property of the complainant.

(2) That the defendant Guy S. Allen, as Treasurer of the United States of America, be directed to account for and pay over to the complainant the proceeds of the sale of said 2,298 shares of common stock of the International Textile, Inc., now in his possession or custody, together with any and all interest or income earned thereon.

(3) That the complainant have such further relief as may be proper in the premises.

HIRSCH, SHERMAN & LIMBURG,
Attorneys for Complainant,
17 Office & P. O. Address,
160 Broadway, Manhattan,
New York City.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

MAX HENKELS, being duly sworn, says:

That he is the complainant herein; that he has read and knows the contents of the foregoing bill of complaint, and that the same is true of his own knowledge, except as to the matters therein stated
18 to be alleged on information and belief, and as to those matters he believes it to be true.

MAX HENKELS.

Sworn to before me this
31 day of March, 1921.

W. J. MAGEE,
Notary Public.
Kings Co. No. 49, Reg. No. 2039.
Certificate N. Y. Co. No. 52, Reg. No. 2031.
Commission expires March 30th, 1922.

Answer. 19

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Plaintiff, v. THOMAS W. MILLER, as Alien Property Custodian, and GUY F. ALLEN, as Acting Treasurer of the United States, Defendants.	Equity No. E 21-108.

20

ANSWER TO THE BILL OF COMPLAINT.

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Guy F. Allen, as Acting Treasurer of the United States, separately and severally answering the bill of complaint, and for their separate and several answers say:

(1) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered First of the bill of complaint, and therefore demand strict proof thereof. 21

(2) They admit the averments of paragraph numbered Second of the bill of complaint, except in so far as the same alleges that Thomas W. Miller has been Alien Property Custodian since the 4th day of March, 1919, and to this these defendants say that the said Thomas W. Miller became the duly qualified and acting Alien Property Custodian on the 12th day of March, 1921.

22 *Answer.*

(3-4) They admit the averments of paragraphs numbered Third and Fourth of the bill of complaint.

(5) These defendants have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered Fifth of the bill of complaint, except as set forth in paragraph numbered Sixth herein, and therefore demand strict proof thereof.

(6) Answering the averments of paragraph numbered Sixth of the bill of complaint, these de-
23 fendants say that on or about the 17th day of December, 1918, the Alien Property Custodian, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation did determine that Alb. & E. Henkels, of Langerfeld, Westphalia, Germany, was an enemy within the purview and meaning of the said Act, the amendments thereto and the proclamations and executive orders issued thereunder, and that 2298 shares of the common capital stock of the International Textile, Inc., were owing or belonging to, held for, by, on account of, or for the benefit of, the said Alb. & E. Henkels,
24 and thereafter he required the said shares of stock to be conveyed, transferred, assigned, delivered and/or paid to him as Alien Property Custodian, and the said shares were conveyed, transferred, assigned, delivered and/or paid to him as Alien Property Custodian, to be held, administered and accounted for pursuant to law. Thereafter the Alien Property Custodian, acting in accordance with law, sold the said shares of stock at public auction, and realized from the said sale a large amount of money, which was deposited by the Alien Property Cus-

todian in the Treasury of the United States, in accordance with law, and said money is now held and administered by the Treasurer of the United States. 25

Further answering said averments, these defendants say that should the plaintiff herein establish any right to recover in this suit, these defendants will make a full and accurate accounting of all the money and other property involved in the suit, to the end that a just and equitable decree may be rendered.

(7) Answering the averments of paragraph numbered Seventh of the bill of complaint, these defendants admit that the plaintiff at the time the said shares of stock were conveyed, transferred, assigned and delivered to the Alien Property Custodian reserved his right to make claim to the property or the proceeds thereof, and that the plaintiff asserted at that time that he was not an enemy nor an ally of enemy within the purview and meaning of the Trading with the Enemy Act. 26

For further answer to the averments of the said paragraph, these defendants refer to their answer to paragraph numbered Sixth of the bill of complaint and adopt the same herein.

(8) They admit the averments of paragraph numbered Eighth of the bill of complaint. 27

(9) For answer to the averments of paragraph numbered Ninth of the bill of complaint, these defendants refer to their answer to paragraph numbered Sixth of the bill of complaint, and adopt the same as their answer to paragraph numbered Ninth.

(10) They admit the averments of paragraph numbered Tenth of the bill of complaint.

28 *Answer.*

And now having fully answered the bill of complaint, these defendants pray that they be dismissed with their costs in this behalf expended.

FRANCIS G. CAFFEY,
United States Attorney,
Solicitor for Thomas W. Miller, as Alien Property Custodian, and Guy F. Allen, as Acting Treasurer of the United States.

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29 **Plaintiff's Notice of Motion.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted
30 for Guy S. Allen), as Treasurer of the United States of America,
Defendants.

E 21-108.

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Morris J. Hirsch, verified the 20th day of

March, 1924, and upon the process and pleadings herein, the decree herein dated the 6th day of July, 1921, the order herein dated January 10th, 1922, for satisfaction of said decree, the warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and upon all the proceedings herein, we shall move this Court at a stated term thereof, appointed to be held for the hearing of general motions at the United States Court House and Post Office Building, in the Borough of Manhattan, New York City, on the 25th day of March, 1924, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for 32 an order

(a) naming a master to take and state the account of the defendants, as directed by said decree, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree;

(b) vacating and setting aside so much of the aforesaid order of January 10, 1922, and warrant for satisfaction whereon the same was entered, as satisfies or purports to satisfy the said decree of July 6, 1921, with reference to defendants' duty to account for the income or interest, if any, earned or accrued; 33

(c) vacating and setting aside so much of the receipt of the complainant bearing date the 28th day of November, 1921, and annexed to these papers as Exhibit "I," as releases or purports to release defendants from liability to account for income or interest, pursuant to the said decree of July 6, 1921; and

34 *Plaintiff's Notice of Motion.*

(d) granting such other and further relief as may be proper.

Dated, New York, March 20th, 1924.

Yours, etc.,

HIRSCH, SHERMAN & LIMBURG,
Solicitors for Complainant,
160 Broadway,
Borough of Manhattan,
New York City.

35 To:

WILLIAM HAYWARD, Esq.,
United States Attorney,
Solicitor for Defendants,
U. S. Court House &
Post Office Building,
New York City.

36

Affidavit of Morris J. Hirsch—For Plaintiff. 37

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America,
Defendants. 38

SOUTHERN DISTRICT OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MORRIS J. HIRSCH, being duly sworn, deposes and says as follows:

I am counsel for the complainant herein.

This is a suit in equity brought under the provisions of Section 9 of the Trading with the Enemy Act, wherein the bill of complaint prays an accounting from the Treasurer of the United States of the proceeds of two thousand two hundred and ninety-eight (2,298) shares of the capital stock of International Textile, Inc., a Connecticut corporation, owned by complainant (an American citizen), which had been theretofore seized and sold by the Alien Property Custodian as being the property of an alien enemy, to wit, the firm of Alb. & E. Henkels of Langerfeld, Germany. 39

The cause was tried on July 5, 1921, before Hon. Charles M. Hough, Circuit Judge, sitting as District Judge. Upon the trial the following concession as to the amount of principal sum involved, and to which complainant would be entitled if the Court decided in his favor, was made on the record by counsel:

> "IT IS CONCEDED that the property was sold on March 26th, 1919, and realized the sum of $1,518,000.00, from which was deducted for the expenses of sale $12,947.45, leaving a balance of $1,505,052.55; from which there was de-
> 41 ducted for administration expenses the sum of $2,500.00, which left a balance of $1,502,552.55 of which there has been paid to Mr. Henkels the sum of $628,776.27, leaving a balance in the Treasury of $873,776.28."

Thereafter and on July 6, 1921, a decree was signed in favor of the complainant, determining that complainant was an American citizen and not an enemy or ally of enemy, and that he was the owner of the stock which had been seized and sold by the Alien Property Custodian, and further directing:

> "(3) That the defendant, Frank White, as
> 42 Treasurer of the United States of America, be and he hereby is directed to account for and pay over to the complainant the proceeds of the sale of the said 2,298 shares of common stock of International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon."

No master was named in the decree, however, to take and state the said account.

A copy of said decree is hereto annexed, marked "Exhibit A."

On or about August 1, 1921, defendants appealed from said decree, but thereafter and on or about September 26, 1921, said appeal was dismissed by the Circuit Court of Appeals.

Thereupon, on behalf of the complainant, I took up with the Department of Justice the matter of the payment to the complainant of the proceeds of the sale of his stock. On or about October 27, 1921, I was advised that the Department had received from the Treasury a check to complainant's order for the sum of $873,776.28, being the balance of the principal sum hereinbefore referred to. Thereupon 44
I attended at the office of the Attorney General in Washington on October 29, 1921, accompanied by the complainant personally, and conferred there with Assistant Attorneys General Guy D. Goff, Adna R. Johnson, Jr., and Dean H. Stanley. The above-mentioned check for $873,776.28 was tendered to the complainant in full satisfaction of the decree and at the same time he was requested, as a condition of receiving the check, to execute a general release and have a warrant for the satisfaction of the decree executed by me as one of his solicitors. I objected to such requirement because the proposed payment to complainant of only the balance of the principal sum would not be a full com- 45
pliance with the decree which had provided for the payment of "income or interest, if any," earned on the fund, and claimed that inasmuch as the principal sum, while on deposit in the Treasury, had been invested pursuant to the provisions of the Trading with the Enemy Act and Executive Order issued thereunder, the complainant was entitled to have allocated to him a proportionate share of the actual income earned, and, therefore, I tendered to

46 *Affidavit of Morris J. Hirsch.*

them at that time a proposed form of release which I had prepared and which would fully release the Alien Property Custodian and the Treasurer from all liability as to the principal sum while preserving complainant's right to an accounting for any interest or income earned thereon as directed by the decree. The form of release prepared by the Attorney General is hereto annexed, marked "Exhibit B," and the form tendered by me on behalf of complainant is hereto annexed, marked "Exhibit C." The substantial difference between the two forms was that the Attorney General's form was a
47 complete release, whereas mine was a release for the principal sum without prejudice to complainant's claim to the income.

I urged that this was not a case where enemy owned property had been sold and the proceeds invested and income derived by the Government, nor was it a case in which I was asking for interest as such upon the fund, but, on the contrary, inasmuch as by the decree it had been declared that the stock had always been the property of the complainant, an American citizen, who was not an enemy or ally of an enemy, its seizure had been wrongful, and regardless of the deduction of the expenses of sale and costs of administration (which we were willing to waive), complainant was en-
48 titled by the terms of the decree itself to an accounting for any income or interest earned on the principal.

The matter was left for official determination with Assistant Attorney General Goff, who took the matter under advisement. In order to have before the Department of Justice a record of complainant's position, I left with Mr. Goff a letter addressed to the Attorney General dated October 29th, 1921, a copy of which is hereto annexed,

marked "Exhibit D." The form of release therein referred to as being attached is the one above referred to, whereof copy is annexed hereto as "Exhibit C."

After my return to my office in the City of New York, I prepared a memorandum for submission to the Attorney General. Copy of the letter of transmittal is hereto annexed, marked as "Exhibit E." Under date of November 5th, 1921, I received a communication from the Attorney General of which copy is hereto annexed, marked "Exhibit F."

On November 14, 1921, I telegraphed the Attorney General that inasmuch as the complainant contemplated an absence from the United States, I 50
deemed it advisable to have both forms of release executed before his departure and requested the Department to send me its forms, and on the same day the Department mailed me a form of release in the form of "Exhibit B" above referred to and hereto annexed and warrant for satisfaction of decree, requesting the execution of the release in triplicate by complainant and execution of the warrant in triplicate by me as complainant's solicitor.

Not hearing from the Attorney General for four weeks, I wrote his assistant under date of December 12, 1921, inquiring as to the conclusion reached by him, copy of said letter being hereto annexed, marked "Exhibit G," and in reply was informed by 51
letter dated December 21st, 1921, that the Department would refuse to deliver the check against any form of receipt or release other than that theretofore prepared by it (being the form of "Exhibit B" hereto annexed). A copy of the Department's said letter of December 21st, 1921, is hereto annexed, marked "Exhibit H." Inasmuch as the complainant could not secure payment of the principal to which he was concededly entitled without comply-

52 *Affidavit of Morris J. Hirsch.*

ing with those requirements, he was compelled to accede. Having theretofore executed both forms of release so as to have both available, complainant authorized me to deliver to the Attorney General the release demanded by the Attorney General, and also authorized me to execute and acknowledge the warrant for satisfaction of the decree, which was antedated November 28th, 1921, but was actually executed on the date of its acknowledgment, viz., December 30th, 1921.

Such release and warrant for satisfaction were accordingly mailed by me to the Attorney General on December 30th, 1921. Copies of said release and
53 warrant are hereto annexed, marked "Exhibit I" and "Exhibit J" respectively. Said release and warrant were so executed and delivered solely because the Department of Justice explicitly declined to pay over the principal under the decree unless complainant and his solicitor would execute and deliver the said papers on the Department's prescribed forms.

Thereupon and on or about January 6th, 1922, I received from the Attorney General the check for $873,776.28, dated October 21st, 1921, the same having in the meantime been held in the Attorney General's office pending the determination of the Department on the question of the form of the
54 release required.

On January 10, 1922, the United States Attorney for this District filed the warrant for satisfaction of the decree and obtained an ex parte order thereon, satisfying the decree of July 6th, 1921, copy thereof being hereto annexed, marked "Exhibit K."

Complainant has never had any accounting from the defendants for the interest or income earned on the proceeds of the sale of his stock.

The conceded gross proceeds of the sale is the sum of	$1,518,000.00
From this sum there had been deducted for expenses of the sale	12,947.45
and the balance deposited in the United States Treasury in March, 1919, is the sum of	$1,505,052.55
which sum remained on deposit in the Treasury until March, 1921, when there was charged for expenses of administration	2,500.00
Leaving a balance of	$1,502,552.55
In March, 1921, there had been paid to the claimant on account of principal the sum of	518,776.27
Leaving the then balance	$ 983,776.28
which remained on deposit until April, 1921, when there was paid to the claimant further on account of the principal the sum of	110,000.00
Leaving	$ 873,776.28

56

which was paid to complainant in January, 1922.

57

On December 12, 1923, the United States Senate passed a resolution, requesting the Alien Property Custodian to transmit information as to accrued interest under the Trading with the Enemy Act, pursuant to which defendant Miller, the Alien Property Custodian, made a report on December 15, 1923, a copy of which is hereto annexed, marked "Exhibit I," from which it appears that the sum of $27,009,812.14 of interest had accrued in the

58 *Affidavit of Morris J. Hirsch.*

Treasury prior to March 4, 1923, on money deposited under the terms of the Trading with the Enemy Act with the Secretary of the Treasury.

It therefore now appears that interest or income was in fact earned by the Treasury upon complainant's funds or some portion thereof whilst held therein and that complainant is entitled to an accounting from defendants under the decree herein, upon which accounting it can be determined whether he is entitled to any part of said sum of $27,009,812.14 and any additions thereto held by defendant White as Treasurer, and as the war-
59 rant for satisfaction of the decree in full and the release in full were exacted of complainant as an indispensable condition of his receiving the principal sum to which he was concededly entitled under the decree, I respectfully ask, on complainant's behalf, that a Master be appointed so that accounting may proceed, and that said receipt or release and said warrant and order for satisfaction be set aside in so far as they apply to the interest or income which is to be the subject of such accounting.

MORRIS J. HIRSCH.

Sworn to before me this
20 day of March, 1924.

60

EBEN C. GOULD,
Notary Public,
(Seal) Kings County.
Clerk's No. 355, Register's No. 5107.
Certificate filed in New York County.
Clerk's No. 237, Register's No. 5253.
Commission expires March 30, 1925.

Plaintiff's Exhibit A. 61

At a Stated Term of the District Court of the United States in and for the Southern District of New York, held in the Federal Court Rooms, in the Woolworth Building, 233 Broadway, in the Borough of Manhattan, City of New York, on the 6th day of July, 1921.

Present:
Hon. CHARLES M. HOUGH,
Circuit Judge.

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MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America,
Defendants.

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This cause came on to be heard at this term upon the pleadings and proofs of the respective parties, and was argued by counsel and all process and pleadings were amended on the trial by substituting Frank White as Treasurer of the United States of America as party defendant in the place and stead of Guy S. Allen, and thereupon, upon consideration thereof and on motion of Hirsch, Sherman & Limburg, solicitors for the plaintiff, it is

64 *Plaintiff's Exhibit A—Decree of July 6, 1921.*

ORDERED, ADJUDGED AND DECREED as follows:

(1) That complainant is a citizen of the United States of America, and at the time of the commencement of this action was and still is a resident of the City, County and State of New York, and is not nor at any time has he been an enemy or ally of an enemy of the United States within the meaning and purview of such terms as used and defined in the Trading with the Enemy Act, or in any act amendatory thereof or supplemental thereto, or in any proceeding or executive order issued
65 by the President of United States of America pursuant to the provisions of said Trading with the Enemy Act.

(2) That on the 18th day of June, 1918, complainant was the sole owner of 2298 shares of the common stock of International Textile, Inc., which shares were on the said 18th day of June, 1918, transferred and delivered by complainant to the Alien Property Custodian upon his demand and which were thereafter sold by the said Alien Property Custodian, and the proceeds of such sale were deposited in the United States Treasury in accordance with the provisions of the Trading with the Enemy Act.

66 (3) That the defendant Frank White, as Treasurer of the United States of America, be and he is hereby directed to account for and pay over to the complainant the proceeds of the sale of the said 2298 shares of common stock of International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon.

CHARLES M. HOUGH,
U. S. Circuit Judge.

Consented to as to form
WM. HAYWARD,
U. S. Attorney,
Southern District of New York,
Solicitor for Defendant.

Plaintiff's Exhibit B.

Receipt of MAX HENKELS for payment made pursuant to a decree of the United States District Court for the Southern District of New York, entered July 6, 1921.

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congress known as the "Trading-with-the-Enemy Act," as amended, Max Henkels has heretofore brought suit in the United States District Court for the Southern District of New York against Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, to establish his claim to certain moneys held by the Treasurer of the United States, taken by the Alien Property Custodian as the property of Alb. & E. Henkels; and

WHEREAS, the United States District Court, for the Southern District of New York, has entered a decree in said suit under date of July 6, 1921, ordering the Treasurer of the United States to pay to Max Henkels the proceeds of the sale of 2298 shares of common stock of International Textile, Inc., now in his possession or custody,

NOW, THEREFORE, in consideration of the premises, the undersigned, Max Henkels, the complainant in said suit, does hereby acknowledge receipt from the Treasurer of the United States of the money ordered by said decree to be paid by the Treasurer of the United States, as follows, to wit:

Cash in the sum of $873,776.28 (Eight hundred seventy-three thousand seven hundred seventy-six and 28/100 dollars) paid pursuant to said decree.

And the undersigned does hereby further acknowledge and accept such sum as a full compliance with and satisfaction of said decree.

Plaintiff's Exhibit B—Form Receipt.

IN CONSIDERATION of the premises, the undersigned does hereby release and forever discharge the President of the United States, the Treasurer of the United States, Frank White, individually and as Treasurer of the United States, Guy F. Allen, individually and as acting and Assistant Treasurer of the United States, John Burke, individually and as Treasurer of the United States, Thomas W. Miller, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, A. Mitchell Palmer, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which the undersigned may have, based upon or arising out of said suit or said decree in said suit.

WITNESS the signature of the undersigned ..... at .....
on the.....day of.....192.

.....
Signature

Witness:

.....

.....

STATE OF
COUNTY OF } ss.:

On this.....day of.....in the year 192 , before me personally came.....
.....to me known, and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that said instrument is his voluntary act and deed.

.....
Notary Public

74

Plaintiff's Exhibit C.

WHEREAS, in an action brought in the District Court of the United States, for the Southern District of New York, wherein Max Henkels is plaintiff and Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, are defendants, a decree was duly made and entered on the 6th day of July, 1921, a copy of which is hereto annexed, pursuant to which decree there has been paid over to Max Henkels, the plaintiff in said action, the sum of $873,776.28.

75

NOW, THEREFORE, in consideration of the premises, I, MAX HENKELS, do hereby acknowledge payment to me by the Alien Property Custodian and the Treasurer of the United States, as follows, to wit: Check of the Treasurer of the United States for the sum of $873,776.28 drawn to the order of Max Henkels from the account of Alb. & E. Henkels, Trust #23627, and I do hereby further acknowledge and accept such money as a full com-

76 *Plaintiff's Exhibit C—Form of Receipt.*

pliance with said decree with respect to the balance of the principal sum realized by the Alien Property Custodian on the sale by him of 2298 shares of the capital stock of International Textile, Inc., heretofore sold by the Alien Property Custodian as the property of the alien enemy firm of Alb. & E. Henkels of Langerfeld, Germany.

IN CONSIDERATION of the premises I do hereby release and forever discharge the President of the United States, the Treasurer of the United States, A. Mitchell Palmer, individually and as Alien
77 Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, Thomas W. Miller, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which I may have, based upon or arising out of any and all money or other property paid to or received by the Alien Property Custodian or by the Treasurer of the United States as the money or other property owing or belonging to, or held for, by, on account of or on behalf of, or for the benefit of said firm of Alb. & E. Henkels to the extent only of the sum of Eight hundred seventy-three thousand seven hun-
78 dred seventy-six and 28/100 dollars ($873,776.28) aforesaid, and without prejudice to my claim for the income or interest, if any, earned upon the net proceeds of the sale of the said stock, to wit, the sum of One million, five hundred and five thousand, fifty-two and 55/100 dollars ($1,505,052.55).

And without limiting the generality of the foregoing I do further release and forever discharge them in respect to anything done or omitted in pursuance of any order, rule or regulation made by

the President under the authority of the Trading with the Enemy Act.

WITNESS my hand and seal at the City of New York on the day of October, 1921.

.....(L. S.)

Witness:

.....

Plaintiff's Exhibit D. 80

MJH-MHP
October 29, 1921.

The Honorable,
The Attorney General,
Washington, D. C.

Dear Sir:

MAX HENKELS VS. ALIEN PROPERTY CUSTODIAN AND THE TREASURER OF THE UNITED STATES

Reference is made to the decree entered in this action which provides as follows:

> "That the defendant Frank White, as Treasurer of the United States of America, be and he is hereby directed to account for and pay over to the complainant the proceeds of the sale of said 2,298 shares of common stock of International Textile, Inc., now in his possession or custody *together with the income or interest,* if any, *earned* thereon." 81

It is conceded that the balance of principal of the proceeds of the sale now in the hands of the

82 *Plaintiff's Exhibit D—Letter of October 29, 1921.*

Treasurer is the sum of $873,776.28. The sale of the stock involved in this action yielded originally the sum of $1,505,052.55 which was on deposit in the United States Treasury since March, 1919, until March and April, 1921, when payments made on account reduced the principal sum to the amount of $873,776.28. For this sum a check has been drawn by the Treasurer and forwarded to your office for delivery to the plaintiff. On application for the check it was insisted that the plaintiff should execute a general release, and in the event of his refusal to do so, the principal conceded sum
83 would not be paid to him. I need only refer you to the provisions of Section 9 of the Act and to Executive Order No. 2813, subdivision 5, on the question which has been raised as to whether or not under the terms of the decree and the terms of the Act and the Executive Order, plaintiff would be entitled to receive any income which had been earned upon his funds. I contend that plaintiff is entitled to any income earned upon the funds and your Department contends that he is not, inasmuch as the funds were invested by the Treasurer in United States Securities pursuant to the Act and the Executive Order, and in view of the decision in the case of U. S. vs. Bayard, 127 U. S. 251. This, in my judgment, presents a debatable question and
84 much can be said on both sides, and it is not my purpose to burden you with an argument on the question at this time. I therefore propose that the plaintiff be paid the balance conceded to be due on the principal sum (he waiving all inquiry as to disbursements made by the Government in connection with the sale of his property and the administration expense) and that there be reserved to him the right to put forward his claim to the income earned upon the principal fund, and with

this in view, I have prepared the form of a release to be executed by him which I attach hereto. The Department's objection to such a release is that it will not definitely dispose of the decree and be a complete satisfaction of record. On the other hand, if it should transpire in other cases which may conceivably arise that income is allowable in like circumstances, the insistence of the Department that a complete general release be now had would foreclose the plaintiff from asserting his claim to his manifest detriment, and I submit therefore, inasmuch as no prejudice will ensue, that the form of release submitted by me should be acceptable to the
86 Department, and this I believe would be as much for the benefit of your Department as for the benefit of the plaintiff, as it would be my purpose to institute appropriate proceedings as speedily as possible for the purpose of having this question judicially passed upon and set it at rest for all time.

The Department has suggested that I institute proceedings to settle this question before the payment to the plaintiff of the principal sum. In this suggestion I do not think that I should be called upon to acquiesce for the reason that the plaintiff would be deprived of this large sum of money indefinitely until final determination by the Court of Last Resort; whereas if he were paid the prin-
87 cipal, he would have the use of the money in the interim which at simple interest would be in the neighborhood of $1000 per week, and I am sure the Department would not be astute to deprive him of the use of these funds pending the process of litigation. In view of these circumstances I respectfully urge that the matter be speedily disposed of by you.

Respectfully,

(Sgd.) MORRIS J. HIRSCH.

88 **Plaintiff's Exhibit E.**

November 1, 1921

HENKELS VS. MILLER

To the Attorney General,
Washington, D. C.

Dear Sir:

Herewith is memorandum with respect to the force and effect of Executive Order No. 2813, and also with respect to the disposition of moneys in the hands of the United States Treasurer deposited
89 under the statute and executive orders.

I believe that sufficient is here presented upon which to base the contention that the *Bayard* case is not decisive upon the question which has arisen, or that at least the question is still fairly open.

Respectfully,

(Sgd.) MORRIS J. HIRSCH.

(Attention Mr. Johnson)

90

Plaintiff's Exhibit F. 91

DEPARTMENT OF JUSTICE
OFFICE OF THE ASSISTANT TO THE
ATTORNEY GENERAL
Washington

November 5, 1921

HENKELS v. MILLER

Mr. Morris J. Hirsch,
160 Broadway,
New York City, N. Y.

Dear Sir: 92

I have your letter of the 31st ultimo. Your letter of the 29th ult. as well as your telephone communications with Mr. Johnson have been brought to my attention. As soon as the Attorney General can reach the matter to which you refer, he will give it his very best attention. You of course realize that the questions involving the threatened rail strike have taken most of his time the last two or three weeks and he is now confronted with the coal strike situation. You will agree with me that these matters are of such imminent importance that other questions of lesser moment must rest in abeyance. However, I again assure you that he will take care of your case just as soon as he possibly can. 93

Very cordially yours,

(Sgd.) GUY D. GOFF,
Assistant to the Attorney General.

94 **Plaintiff's Exhibit G.**

December 12, 1921 X1

HENKELS VS. MILLER A. P. C.

Col. Guy D. Goff,
Department of Justice,
Washington, D. C.

My dear Sir,

Reference is made to your letter to me of date November 5, 1921.

Without desiring to appear unduly insistent, I would thank you to advise me if any conclusion
95 has been reached by the Department with respect to the form of the release to be executed by plaintiff.

The courtesy of a reply will be duly appreciated.

With many regards,

Yours sincerely,

(Sgd.) MORRIS J. HIRSCH.

96

Plaintiff's Exhibit H. 97

DEPARTMENT OF JUSTICE
Washington, D. C.

Refer to
9-17-9

ARJ:PMD

December 21, 1921

Hirsch, Sherman & Limburg,
160 Broadway,
New York City.

IN RE HENKELS V. CUSTODIAN

98

Sirs:

Receipt is acknowledged of your recent letter in which you inquire the conclusion of the Department in respect to the form of release to be executed by plaintiffs.

You are respectfully advised that the Department has given this matter careful consideration and cannot see its way clear to accept any release other than that indicated to you at the hearing granted you in Washington.

Respectfully,

For the Attorney General
GUY D. GOFF,
Assistant to the Attorney General.

99

100 **Plaintiff's Exhibit I.**

Receipt of MAX HENKELS for payment made pursuant to a decree of the United States District Court for the Southern District of New York, entered July 6, 1921.

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congres known as the "Trading-with-the-Enemy Act," as amended, Max Henkels has heretofore brought suit in the United States District Court for the Southern District of New York against Thomas W. Miller, as Alien Property Cus-
101 todian, and Frank White, as Treasurer of the United States, to establish his claim to certain moneys held by the Treasurer of the United States, taken by the Alien Property Custodian as the property of Alb. & E. Henkels; and

WHEREAS, the United States District Court, for the Southern District of New York, has entered a decree in said suit under date of July 6, 1921, ordering the Treasurer of the United States to pay to Max Henkels the proceeds of the sale of 2298 shares of common stock of International Textile, Inc., now in his possession or custody,

102 NOW, THEREFORE, in consideration of the premises, the undersigned, Max Henkels, the complainant in said suit, does hereby acknowledge receipt from the Treasurer of the United States of the money ordered by said decree to be paid by the Treasurer of the United States, as follows, to wit:

Cash in the sum of $873,776.28 (Eight hundred seventy-three thousand seven hundred seventy-six and 28/100 dollars) paid pursuant to said decree.

And the undersigned does hereby further ac-

Plaintiff's Exhibit I—Receipt, November 8, 1921. 103

knowledge and accept such sum as a full compliance with and satisfaction of said decree.

IN CONSIDERATION of the premises, the undersigned does hereby release and forever discharge the President of the United States, the Treasurer of the United States, Frank White, individually and as Treasurer of the United States, Guy F. Allen, individually and as acting and Assistant Treasurer of the United States, John Burke, individually and as Treasurer of the United States, Thomas W. Miller, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, A. Mitchell 104
Palmer, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which the undersigned may have, based upon or arising out of said suit or said decree in said suit.

WITNESS the signature of the undersigned..... .....at New York City, N. Y. on the twenty-eighth day of November, 1921.

MAX HENKELS
Signature 105

Witness:

WALTER A. HIRSCH
MORTIMER H. HESS

106 *Plaintiff's Exhibit I—Receipt, November 8, 1921.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this twenty-eighth day of November in the year 1921, before me personally came MAX HENKELS, to me known, and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that said instrument is his voluntary act and deed.

HARRY F. MELA,
(Seal) Notary Public,
107 New York County No. 377.
N. Y. Co. Reg. No. 3310.
Commission Expires Mar. 30, 1923.

108

Plaintiff's Exhibit J. 109

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Plaintiff, vs. THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, Defendants.	Equity No. 21/108.

110

WARRANT FOR SATISFACTION OF DECREE.

To the Clerk of the District Court of the United States for the Southern District of New York:

WHEREAS Max Henkels, the plaintiff herein, did on the 6th day of July, 1921, obtain a decree in the District Court of the United States for the Southern District of New York against Frank White, as Treasurer of the United States, directing him to account for and pay over to the plaintiff the proceeds of the sale of 2298 shares of the common stock of the International Textile, Inc., then in his possession or custody, together with the income or interest, if any, accrued thereon. 111

AND WHEREAS, the said Max Henkels has received satisfaction for the same; these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of

112 *Plaintiff's Exhibit J—Satisfaction of Decree.*

said decree and for your so doing, this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, we, as solicitors of record of the said Max Henkels, have hereunto set our hand and affixed our seal this 28th day of November, 1921.

HIRSCH, SHERMAN & LIMBURG,
Solicitors for plaintiff,
By MORRIS J. HIRSCH,
A Member of the firm.

113

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

BE IT REMEMBERED, that on this 30th day of December, 1921, before me, the subscriber, a Notary Public of the State of New York, personally appeared Morris J. Hirsch, a member of the firm of Hirsch, Sherman & Limburg, who, I am satisfied, is the person named in and executing the foregoing Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same
111 as his voluntary act and deed, for the uses and purposes therein set forth.

LIONEL S. POPKIN,
(Seal) Notary Public,
State of New York.
Notary Public, N. Y. Co. Clerk's No. 317.
Register's No. 3286.
Commission expires March 30, 1923.
My Commission expires.....

Plaintiff's Exhibit K. 115

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,
Plaintiff,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States,
Defendants.

E 21/108.

116

Upon reading and filing the annexed consent, and upon motion of William Hayward, United States Attorney, attorney for the defendants Thomas W. Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, it is

ORDERED that the decree, heretofore entered herein and dated July 6, 1921, directing the defendant Frank White, Treasurer of the United States, to account for and pay over to the plaintiff the proceeds of the sale of 2,298 shares of the common stock of the International Textile, Inc., together with the income or interest, if any, accrued thereon, be and the same is hereby satisfied of record.

117

Dated, New York, January 10, 1922.

(Sgd.) J. M. MACK,
U. S. C. J.

118 **Plaintiff's Exhibit L.**

68TH CONGRESS, *1st Session.* SENATE. DOCUMENT No. 10.

ACCRUED INTEREST UNDER TRADING WITH THE ENEMY ACT.

LETTER FROM THE ALIEN PROPERTY CUSTODIAN TRANSMITTING IN RESPONSE TO SENATE RESOLUTION NO. 49 OF DECEMBER 12, 1923, INFORMATION AS TO CERTAIN ACCRUED INTEREST UNDER THE TRADING WITH THE ENEMY ACT.

119

December 18, 1923.—Referred to the Committee on Appropriations and ordered to be printed.

ALIEN PROPERTY CUSTODIAN,
Washington, December 15, 1923.

The PRESIDENT OF THE SENATE,
Washington.

SIR: I have the honor to acknowledge receipt of Senate Resolution No. 49, directing the Alien Property Custodian to submit to the Senate certain information.

120 In answer to paragraph (a) of the resolution, you are advised that under date of November 7, 1923, this office was informed by the Treasury Department that the sum of $27,009,812.14 had accrued in the Treasury prior to March 4, 1923, on money deposited under the terms of the trading with the enemy act with the Secretary of the Treasury.

In answer to paragraph (b), there is no provision under the trading with the enemy act, or any

amendments thereto, providing for the payment of interest to an alien enemy when his or her property is returned under the provisions of said act.

In answer to paragraph (c), you are advised that the above sum, representing accrued interest, as well as the remaining alien property not subject to return under the act or amendments thereto, is awaiting such disposition as Congress may make thereof.

Replying specifically to paragraph (c), administrative difficulties are foreseen should accrued interest prior to March 4, 1923, be prorated and ordered distributed to each trust under which it was earned. 122

At one time there were approximately 50,000 active trusts administered by the Alien Property Custodian representing one or more persons. It seems to be impracticable to prorate the interest previous to March 4, 1923, in a proportionate share for each trust involved. The entire amount of alien property represented by cash in the Treasury has not been invested in full, due to the necessity of a cash balance on hand approximating $5,000,000 at all times. It would be difficult to ascertain just which portion of this uninvested fund was taken from the respective trusts, which computation would be necessary, if the accrued interest were divided over a period of five and one-half years, 123 during which time this fund has been invested and reinvested by the Treasury Department.

Respectfully yours,

THOMAS W. MILLER,
Alien Property Custodian.

124 **Additional Affidavit of Morris J. Hirsch—For Plaintiff.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Complainant, against THOMAS W. MILLER, as Alien Property Custodian, and 125 FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America, Defendants.	In Equity No. 21-108.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK, COUNTY OF NEW YORK, } ss.:

MORRIS J. HIRSCH, being duly sworn, says: I am one of the solicitors for the complainant herein.

In preparing the affidavit on this motion I neglected to set forth the proceedings in the Circuit 126 Court of Appeals resulting in the dismissal of defendants' appeal, which said proceedings are of record in the Appellate Court, but not in this court.

The decree, as stated in the original affidavit, was rendered on July 6th, 1921. The assignments of error were filed and the appeal allowed and citation issued on August 1st, 1921. On September 20th, 1921, I served notice of motion returnable on October 3rd, 1921 (the opening of the

October Term), to affirm the decree upon the ground that the appeal was frivolous, or in the alternative to advance the cause for immediate argument. Copy of the notice of motion is hereto annexed marked Exhibit M.

On September 26th, 1921, Mr. John Holley Clark, Assistant to the United States Attorney in this District, informed me by telephone that he had received instructions from the Attorney General's office in Washington to consent to a dismissal of the appeal without costs. Thereupon and on the same day a consent was signed accordingly and on the same day the order of dismissal was 128
signed by one of the judges in the Circuit Court of Appeals. A copy of the said order of dismissal and of the consent subjoined thereto is hereto annexed marked Exhibit N. On the same day, to wit, September 26th, 1921, I served a certified copy of said order of dismissal on the United States Attorney for this District.

It was about a month later that the check to complainant's order was drawn and I was advised that it was ready for delivery as stated in my original affidavit.

(Sgd.) MORRIS J. HIRSCH.

Sworn to before me this 129
1st day of April, 1924.

EBEN C. GOULD,
Notary Public,
(N. S.) Kings County.
Clerk's No. 355, Register's No. 5107.
Certificate filed in New York County,
Clerk's No. 237, Register's No. 5253.
Commission expires March 30, 1925.

130

Plaintiff's Exhibit M.

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

	MAX HENKELS, Plaintiff-Appellee, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America, Defendants-Appellants.	No. 131 October Term, 1921.

131

Sir:

PLEASE TAKE NOTICE that upon the transcript of record on appeal from the decree in equity of the District Court of the United States for the Southern District of New York, the undersigned will move this court at a stated term thereof to be held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 3rd day of
132 October, 1921, at 10.30 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, to affirm the decree appealed from herein, on the ground that it is manifest from said transcript of record that the questions on which the decision of this cause depends are so frivolous as not to need further argument, or, in the alternative, to advance the cause for immediate argument upon the ground that the case is of such a character as not to justify extended argument, and for such

other or further relief as to the court may seem just.

Dated, New York, September 20th, 1921.

Yours, etc.,

MORRIS J. HIRSCH,
Counsel for Plaintiff-Appellee.

To:
WILLIAM HAYWARD, Esq.,
Counsel for Defendants-Appellants.

134

Plaintiff's Exhibit N.

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

MAX HENKELS, Plaintiff-Appellee, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America, Defendants-Appellants.	No. 131 October Term, 1921.

135

The defendants, Thomas W. Miller as Alien Property Custodian, and Frank White as Treas-

136 *Plaintiff's Exhibit N—Order.*

urer of the United States of America, having duly appealed to this court from the decree heretofore made by the District Court of the United States for the Southern District of New York, and entered in this cause on the 6th day of July, 1921, and the transcript of the record from said District Court having been duly filed in this court, and the appellee having duly entered his appearance herein, and having given notice of motion to affirm the decree so appealed from or to advance this cause for immediate argument and for further relief, returnable on the 3d day of October, 1921, and
137 upon the subjoined consent of the counsel for the respective parties hereto, and on motion of Morris J. Hirsch, Counsel for Plaintiff-Appellee, it is now hereby

ORDERED, ADJUDGED AND DECREED by this court that the appeal of Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America, defendants above named, from the final decree of said District Court made and entered in this cause on the 6th day of July, 1921, be and the same is hereby dismissed without costs to either party as against the other.

138 Dated, New York, September 26th, 1921.

C. M. HOUGH,
C. J.

WE HEREBY CONSENT to the entry of this order.

Dated, New York, September 26, 1921.

MORRIS J. HIRSCH,
Counsel for Plaintiff-Appellee.

WM. HAYWARD,
Counsel for Defendants-Appellants.

Affidavit of Dean Hill Stanley—For Defendants. 139

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Complainant, vs. THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, Defendants.	Eq. 21-108. 140

DISTRICT OF COLUMBIA, ss.:

DEAN HILL STANLEY, being duly sworn, deposes and says as follows:

I am a Special Assistant to the Attorney General of the United States and as such represented Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, in the above entitled cause.

141 After a decree had been entered in favor of the plaintiff and the appeal which had been prosecuted on behalf of the Custodian and the Treasurer, had been dismissed by consent of the parties by the Circuit Court of Appeals, it became my duty to take the necessary steps to effect a satisfaction of the final decree. To that end I dictated a letter to the Secretary of the Treasury enclosing a certified copy of the final decree and directing him to satisfy the provisions thereof, and to send to the

Department a Treasury warrant for the amount covered by the decree. This letter was signed by Guy D. Goff, Assistant to the Attorney General. Thereafter in a letter dated October 27, 1921, and signed by S. P. Gilbert, Jr., Undersecretary of the Treasury, the Treasury Department transmitted to the Attorney General a check in the amount of $873,776.28.

Thereafter, Morris J. Hirsch, Esquire, attorney for the plaintiff, was advised that the Department was prepared to satisfy the decree. To the best of my recollection, Mr. Hirsch came to my office in
143 the Department of Justice for the purpose of receiving satisfaction of the decree. Thereupon I requested him to execute concurrently with the delivery of the check, a receipt for the amount and a warrant for the satisfaction of the decree. Mr. Hirsch, when advised of the amount of the check, stated that he was of the opinion that the check was insufficient in amount to satisfy the decree. He asserted that there was interest due to the plaintiff upon the principal amount of the recovery, in view of the fact that funds deposited in the Treasury of the United States by the Alien Property Custodian were invested and reinvested by the Secretary of the Treasury in Government securities.

144 I stated to Mr. Hirsch at that time that I did not believe that the law permitted the recovery by Mr. Henkels of any interest upon the principal amount of the decree, either from the United States or by reason of the fact that funds deposited by the Alien Property Custodian in the Treasury of the United States had, in part, been invested in interest bearing Government securities. I stated to Mr. Hirsch that I believed that the situation was fully covered by the case of *U. S. ex rel. Angarica*

v. *Bayard,* 127 U. S. 330. Furthermore, to the best of my recollection, I explained to Mr. Hirsch the method of investing the funds deposited by the Treasurer of the United States as aforesaid. This explanation was substantially the same as the facts set forth in the affidavit of Michael J. O'Reilly, verified April 3, 1924, and submitted herewith.

Thereupon Mr. Hirsch and I argued the matter at length without either of us being able to agree with the other, although Mr. Hirsch, to my best recollection, stated that it was an arguable point. I stated to Mr. Hirsch, at this time, that I was quite willing that the whole matter be submitted to the Court in the proper manner, in order that 146 the Court might decide the controversy. Mr. Hirsch appeared unwilling to follow such a course. He requested that arrangements be made for him to argue the matter before Colonel Guy D. Goff, who was then Assistant to the Attorney General. These arrangements were made and Mr. Hirsch presented his views to Colonel Goff. I was present at the conference and stated what I considered to be the law. After due consideration and after submission of a memorandum of law by Mr. Hirsch, Colonel Goff sustained the view which I had asserted.

Mr. Hirsch, during the discussions with Colonel Goff and me, and likewise with Mr. A. R. Johnson, 147 Jr., Chief of the division in charge of matters arising under the Trading with the Enemy Act in the Department of Justice, offered to sign a release and warrant for satisfaction, reserving the right to take further action with respect to the recovery of interest. Mr. Hirsch was advised that the Department did not believe that it was compatible with the interest of the Government or of the proper handling of the case, to have the decree

148 *Affidavit of Dean H. Stanley.*

satisfied in part and leave open further questions thereunder.

I stated to Mr. Hirsch, as likewise did Colonel Goff, to my best recollection, that the Department was quite willing to co-operate with him in bringing the matter to a speedy hearing before the Court, if he so desired. Mr. Hirsch appeared to be unwilling to do this, and later Mr. Henkels executed a receipt and release in full and Mr. Hirsch executed the warrant for satisfaction of the decree, upon which the order referred to in his affidavit was entered.

149

(Sgd.) DEAN HILL STANLEY.

Subscribed and sworn to before me
this 3rd day of April, 1924.

(Sgd.) Jos. P. Rudy,
Notary Public, D. C.
My commission expires January 25, 1929.

150

Opinion. 151

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America,
Defendants.

E 21-108.

152

Motion to set aside the release and satisfaction of decree executed by the plaintiff in the above-entitled suit. The suit was under Section nine of the Trading with the Enemy Act and resulted in an interlocutory decree adjudging the plaintiff to be an American citizen and the owner of certain shares of stock seized by the Alien Property Custodian on June 18, 1918, and afterwards sold under Section twelve. It further decreed that the 153
defendants, the Alien Property Custodian and Treasurer of the United States, should account for the proceeds of the sale "together with the income or interest, if any, earned thereon." A controversy arose as to whether any such interest was earned, which the defendants denied. The plaintiff wished immediately to get the principal sum of the sale, i. e., $873,776.28, the amount of which was agreed on, but which the defendants refused to pay with-

out receiving a release in full and satisfaction of the decree. To this the plaintiff objected, asserting his right to receive the principal at once and later to litigate the question of the interest or income in an accounting under the interlocutory decree. Being unable to prevail, he yielded and gave the release and satisfaction required. The motion is based upon the theory that these documents were procured by duress and should be set aside and that the accounting should proceed.

Morris J. Hirsch and Harry F. Mela for the
155 motion.

Dean Hill Stanley opposed.

Learned Hand, D. J.:

If the plaintiff had present right unconditionally to receive the principal, its retention by the defendants involved a loss to him arising from the defendants' wrong. The proceeds must under Section twelve be invested in United States securities and these I may take judicial notice bear a smaller interest than six per cent., the legal rate. Thus the delay in receiving the principal would have
156 resulted in a loss to the plaintiff pending the accounting, assuming that the legal rate is a fair compensation for the use of money. Hence the plaintiff argues that he was subjected to a penalty in case he refused to give the release and satisfaction. I will not, because I need not, say that it would not be duress to exact the documents as a condition of immediate payment, if the principal was due. Perhaps the case so viewed may be within the doctrine of Maxwell vs. Griswold, 10 How. 242, Robertson vs. Frank Bros. Co., 132 U. S. 17,

Edwards vs. Chile Copper Co., 273 Fed. Rep. 452 (C. C. A. 2), Swift Co. vs. U. S., 111 U. S. 22. But in those cases the payment was exacted to secure the release of property to which the plaintiff was absolutely and immediately entitled or to avoid a statutory penalty, or to prevent a business from being closed. Unless there be some such right the plaintiff has no case.

In the case at bar the plaintiff had no present right to the principal sum. In the first place the interlocutory decree did no more than give him an accounting on which the account had not yet been stated. True, the parties had agreed on the amount 158
due for principal but that agreement did not create a present right or duty and the defendants would have had no warrant for the payment till the court had so ordered. Formally at any rate the necessary condition was lacking until the plaintiff had procured a decree for the payment of the principal.

But the case does not stop there. No such decree could lawfully have been passed until the whole account was finally struck, including interest as well as principal. The statute is explicit on the duties of the defendants in this regard. Section twelve so far as relevant reads as follows: "If suit shall be so instituted, then such money or
property shall be retained in the custody of the 159
Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the

claimant or suit otherwise terminated." It is true that this provision was intended primarily to protect the claims of third persons, of whom the plaintiff is one, upon the fund, but it is none the less the rule and the only rule applicable to the payment of moneys out of the funds collected under the act in the absence of further action by Congress. It forbids any payment of the sums collected after suit commenced under Section nine except on order of the court in satisfaction of the final decree or other termination of the suit. The defendants had no lawful power to pay, and the
161 plaintiff had no right to get, any part of the sum collected from the sale of the property until the suit had gone to final decree. Thus he was not unlawfully kept out of his money; the statute gave him the option, and only that, to take what the defendants would agree to give in final settlement, or to prosecute the accounting to final decree.

Even if the defendants had wilfully refused, which they did not, to give him interest known to them to be due, his recourse was only to the court. The question whether any interest was earned at all in the sense that the law intended was possibly open to them even under the decree, but if not, and if, as the plaintiff says, the decree had foreclosed it, still the amount was open to genuine dispute
162 and the defendants were in duty bound to insist on its liquidation by a court. Till it was liquidated the plaintiff had no rights whose denial could be the basis of a charge of duress. If he would get his past due interest, it was at the expense of suffering any loss involved in letting his principal meanwhile lie at a lower rate of interest. He might not consent to treat the decree as final by giving a satisfaction in full and still reserve his right later to litigate the question of interest.

To set aside the satisfaction would make the payment of principal unlawful since it would then have been a payment without any final decree to support it, which is contrary to the statute.

The result is not so harsh as the plaintiff would have me think, though its harshness would be irrelevant if it existed. It was not unreasonable for Congress to insist that the payments should not be made piece-meal and that the whole fund should remain intact until finally disposed of by the court. After all, the security was the highest possible and the return was what the financial world deems adequate under such circumstances.

The motion is denied. 164

May 15, 1924.

LEARNED HAND,
D. J.

165

166

Decree.

At a Stated Term of the United States District Court, for the Southern District of New York, held at the United States Court House and Old Post Office Building, in the Borough of Manhattan, New York City, in said District, on the 23rd day of May, 1924.

Present:

Honorable LEARNED HAND,
United States District Judge.

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MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America,
Defendants.

E 21-108.

168

This cause came on to be further heard at this Term and was argued by counsel and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED, as follows, viz.: that the application of the complainant to name a master and have an accounting by the defendants as directed by the decree of July 6th, 1921, and to vacate and set aside the order of January 10th, 1922, the warrant for satisfaction of decree and the receipt or release of the complainant bearing date the 28th

day of November, 1921, in so far as said order, warrant and release apply to the interest or income mentioned in said decree (which said application was heard and determined upon affidavits in the form of a contested motion), be and the same is hereby in all respects denied.

LEARNED HAND,
U. S. District Judge.

Assignments of Error.

170

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Complainant, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America, Defendants.	In Equity No. 21-108.

171

Now comes the complainant, Max Henkels, by Hirsch, Sherman & Limburg, his solicitors, and says that the decree in the above-entitled cause entered on the 23rd day of May, 1924, is erroneous and that in the record and proceedings and in the

172 *Assignments of Error.*

decree aforesaid manifest error has intervened to the prejudice of said complainant, as follows, to wit:

1. The Court erred in denying the application of the complainant which was embraced in the complainant's notice of motion dated March 20th, 1924.

2. The Court erred in making a decree equivalent to the dismissal, upon pleadings and proofs, of a supplemental bill of complaint for the same relief as that sought by complainant's motion and
173 prayed for in his notice of motion dated March 20th, 1924.

3. The Court erred in refusing to grant to complainant any relief in this cause.

4. The Court erred in refusing to name a master to take and state the account of the defendants, as directed by the decree of July 6th, 1921, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree.

5. The Court erred in refusing to direct that
174 the accounting directed in and by said decree of July 6th, 1921, should now proceed.

6. The Court erred in refusing to vacate or set aside so much of the order of January 10th, 1922, for satisfaction of the said decree of July 6th, 1921, and warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and whereon the said order was entered, as satisfies or purports to satisfy said decree of July 6th, 1921,

with reference to defendant's duty to account for the income or interest, if any, earned or accrued.

7. The Court erred in refusing to vacate or set aside so much of the receipt or release of the complainant bearing date the 28th day of November, 1921, and annexed to complainant's motion papers as Exhibit "I," as releases or purports to release defendants from liability to account for income or interest pursuant to said decree of July 6th, 1921.

8. The Court erred in refusing to decree that said warrant for satisfaction of decree and receipt or release, in so far as the same apply to the interest or income mentioned in said decree of July 6th, 1921, were delivered by complainant to defendants involuntarily and under duress. 176

WHEREFORE, the said complainant prays that said decree of the United States District Court, for the Southern District of New York, entered in this cause on the 23rd day of May, 1924, be reversed and that the said Court may be directed to enter a decree in accordance with the prayer of said notice of motion.

Dated, New York, June 16th, 1924.

HIRSCH, SHERMAN & LIMBURG, 177
Solicitors for Complainant,
160 Broadway, New York City.

178 **Appeal and Allowance.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS, Complainant, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America, Defendants.	In Equity No. 21-108.

179

To the Honorable, the Judges of the United States District Court, for the Southern District of New York:

Now comes the above named complainant, Max Henkels, by Hirsch, Sherman & Limburg, his solicitors, and feeling himself aggrieved by the decree of this Court entered on the 23rd day of May, 1924, denying his application to name a master
180 and have an accounting by the defendants and to vacate and set aside a certain order, warrant and receipt or release, in so far as said order, warrant or release apply to interest or income, as in said decree more fully set forth, doth hereby pray that an appeal may be allowed to him from the said decree to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and that a transcript of the record, proceed-

ings and papers upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, June 16th, 1924.

HIRSCH, SHERMAN & LIMBURG,
Solicitors for Complainant,
160 Broadway, Manhattan,
New York City.

The foregoing appeal is hereby allowed; bond $250.

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Dated, New York, June 17th, 1924.

JNO. C. KNOX,
U. S. D. J.

Bond on Appeal.

This is a bond in the usual form, executed by complainant as principal and United States Fidelity & Guaranty Company as surety, dated June 14, 1924, in the penal sum of $250, to defendants as obligees. The parties have waived the copying of said bond in full in this transcript. 183

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Citation.

By the Honorable JOHN C. KNOX, *One of the Judges of the United States District Court, for the Southern District of New York, in the Second Circuit.*

To THOMAS W. MILLER, *as Alien Property Custodian, and* FRANK WHITE, *as Treasurer of the United States of America,* GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, in the City of New
185 York, in the District and Circuit above named, on the 17th day of July, 1924, pursuant to an appeal and allowance thereof filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Max Henkels is appellant and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of June, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the
186 United States the one hundred and forty-eighth.

JNO. C. KNOX,
U. S. District Judge.

(Endorsed): Copy rec'd June 18/24. Wm. Hayward, U. S. Attorney A. C.

Stipulation re Certification. 187

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America, 188
Defendants.

IT IS HEREBY STIPULATED that the foregoing printed copy is a true transcript of the record in the above entitled cause, as agreed upon by the parties, and the whole thereof, now on file in the office of the Clerk of the United States District Court, for the Southern District of New York, and that said Clerk may so certify the same; and it is

FURTHER STIPULATED that the filing of a praecipe under United States Equity Rule 75 be and the same is hereby waived. 189

Dated, New York, July 8th, 1924.

HIRSCH, SHERMAN & LIMBURG,
Solicitors for Complainant-Appellant.

WILLIAM HAYWARD,
U. S. Attorney
Solicitor for Defendants-Appellees.

190 **Clerk's Certificate.**

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

MAX HENKELS,
Complainant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE (substituted for Guy S. Allen), as Treasurer of the United States of America,
Defendants.

In Equity No. 21-108.

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I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City
192 of New York, in the Southern District of New York, this 5th day of July, in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States of America the one hundred and forty-~~eighth~~ ninth.

(Seal)

ALEX. GILCHRIST, JR.,
Clerk.

In United States Circuit Court of Appeals for the Second Circuit

Before Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges; Hon. Augustus N. Hand, District Judge

Max Henkels, Appellant,

vs.

Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, Appellees

Appeal from a Final Order Entered in the District Court for the Southern District of New York

Opinion

Henkels brought suit under Section 9 of the Trading with the Enemy Act, (40 Stat., 419,) alleging in substance that the Custodian had seized and retained possession of certan shares of stock belonging to him individually and issued by a domestic incorporated Company. Henkels was and is a citizen of the United States.

The principal issue resolved at trial was that the stock so seized did belong absolutely to plaintiff Henkels and was not, as contended by the Custodian, property of the enemy copartnership in which Henkels had admittedly a partner's interest. Prior to the filing of the bill the Custodian had sold the shares of stock so seized and paid over the net proceeds of sale to the Treasurer of the United States. After trial a decree was entered specifically directing the defendant Treasurer "to account for and pay over to the complainant (Henkels) the proceeds of the sale of the said (stock) now in his possession or custody, together with the income or interest if any earned thereon".

It was agreed between the parties that the United States Treasurer had in his possession as the net remaining proceeds of the sale of Henkels' stock, the sum of $873,776.28.

The decree above referred to was entered 6th July, 1921. During the ensuing six months or thereabouts efforts were made by Henkels' attorney to recover not only this admitted sum, but the "income or interest earned thereon" by said Treasurer and/or the Custodian.

It is now agreed that the Custodian never received any dividends on the stock prior to sale. Whatever profits or advantages resulted to anyone from the stock or its proceeds arose because in compliance with Section 12 of the Act, (40 Stat., 423,) the Secretary of the Treasury had invested most of all the moneys realized from sales of property seized by the Custodian, in the securities of the United States yielding interest. There was never any such investment of the specific sum obtained from the sale of Henkel's stock or any other particular lot of seized property. Nor had the Secretary invested all the money so received by him from the Custodian, because there was kept on hand a cash balance of approximately Five million dollars at all times to provide for obvious possible contingencies.

But from the investment of the major portion of the moneys realized from Custodian's sales there had accrued in the Treasury of the United States prior to March 4, 1923, the sum of Twenty-seven million dollars. (Document No. 10, Senate 68th Congress, 1st Session.)

To some equitable portion of this income, interest or increment Henkels laid claim under the decree above recited.

The defendants, through the Attorney General of the United States, refused to pay anything but the above admitted principal, viz: $873,776.28, and Henkels, for business reasons, finally executed and delivered a receipt and release in consideration of that sum on which an order satisfying the aforesaid decree of record was entered in the Court below January 10, 1922.

On becoming aware of the very great profits accruing to the United States Treasury by the investment of funds produced by Custodian's sales, plaintiffs moved in the Court below to be relieved of the release as above stated by Henkels, and to have the order of satisfaction set aside on the ground that the same had been obtained by duress and to the end that application might be made for a Master to ascertain what income or interest had been obtained by defendants or either of them from the use and investment of the fund which contained Henkels' $873,776.28.

This motion the Court denied, and from the order of denial this appeal was taken by complainant.

Herbert R. Limburg for Henkels-appellant;

Dean Hill Stanley, Special Assistant to the Attorney-General, opposed.

HOUGH, C. J.:

This bill presents two questions: 1st. Can appellant, by his plea of duress, be relieved of the receipt and release executed by him? And, 2d, if such relief be granted, could he recover any more than he has received in this litigation?

Some other matters have been discussed arising out of an inquiry whether the decree of July, 1921, was final or interlocutory. To this question we shall pay no attention. It is a mere matter of detail, and the vitals of the case are plain enough.

Of the two questions above stated we prefer to consider the second, for however interesting the question of duress may be, considering the trend of modern decisions, a judgment here favorable to appellant would leave the second question undetermined, while the second question, if decided adversely to appellant, disposes so far as we are concerned of the whole matter.

Appellant's proposition is that the Custodian became a trustee for Henkels in respect of this stock and its proceeds. It is now adjudicated that there was never any right to seize the stock, wherefore the Custodian must respond, like any other trustee who has made profit out of the fund for which he is held ultimately responsible.

It is undoubtedly true that in a certain sense the Custodian is a trustee. He is called by that name in the 12th section of the Act

(40 Stat., 423), and he has called attention to his trusteeship for the public at the bar of this and many other Courts.

But if appellant's theory of attack be considered closely it is clear that the trusteeship that he invokes as against the Custodian is one arising ex maleficio. It is a trusteeship created by a wrong; and that wrong was a seizure of property belonging to an American citizen and unaffected by emeny ownership.

The niceties of the law of torts have not been and cannot be strictly regarded in statutes passed under the stress of war and designed to meet war conditions.

As the Court said in Stoehr vs. Wallace, 255 U. S., 239, at page 245: "What Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy owned if adequate provision be made for a return in case of mistake is not debatable." And what shall be "adequate provision" is for the Congress to declare.

That mistakes would be made under this Act was undoubtedly contemplated, and the Act itself declared in the amendment of November 4, 1918 (40 Stat., 1020)—"That the sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed * * * to the Alien Property Custodian * * * or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property * * * shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." This means in substance that persons in the position of Henkels have no remedy except under Section 9 of the act, and under that section the amendment just referred to limited recovery to the "net proceeds" received from the property involved.

Again it is to be observed that appellant's contention and any holding of the Custodian to the liabilities of a trustee ex maleficio is opposed certainly to the spirit and we think to the letter of subdivision c of Section 7 of the statute (40 Stat., 418) declaring that "no person shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this act." And the actions of the Custodian even when he makes mistakes are and always were pursuant to such presidential rule.

Again, in whatever trusteeship the Custodian functions, the statute (Sec. 12, 40 Stat., 423) confines his office to "property other than money." As to money he is compelled to pay that forthwith into the Treasury of the United States, and the Congress in so many words has refused to him in respect of money the position of trustee.

Tested by ordinary legal formulæ the exact standing of the Custodian is difficult of definition when the various descriptions of his duties, privileges and responsibilities prescribed by statute are considered together. But this much is we think clear, that it can never be said that by reason of conduct such as occurred in this case of Henkels the Custodian became a trustee for Henkels in the same sense that he would have become a trustee under a deed inter partes, or by reason of an actionable wrong.

There is a technical reason why under this decree Henkels can never succeed in holding the Custodian to the position of a trustee: it is that the decree for money and for an accounting for money runs against the Treasurer of the United States only.

But this objection goes deeper than a mere technicality, it is a recognition in and by the decree of the fact that when the Custodian sold Henkels' stock and paid the proceeds into the Treasury, he lost control of the money; it became like any other money in the Treasury of the United States and there subject to congressional action in respect thereof.

The only reason why the decree could in any way operate against the Treasurer of the United States or the Secretary of the Treasury is Section 9 of the statute, the authority of the court below to affect the Treasurer with the decree depended upon that statute alone.

Remembering the admission that no dividends ever accrued upon this stock, the sole question now becomes this: Can the United States be compelled to pay to Henkels whatever gain it has made out of handling Henkels' money while it was in the Treasury?

We pay no attention to the difficulty of allocating any special gain to this special fund; let it be supposed that that could be done; the question remains whether under existing law the United States is under compulsion to admit Henkels to a share of that property.

Thus the matter becomes the old one of allowing interest against the United States.

It is sought to justify such recovery here by analogy to cases of condemnation of lands or other property for private use. The theory of all such well considered decisions is that since no American Government can take private property for public use without making just compensation—and just compensation includes reasonable interest for delay in payment of amounts awarded—therefore interest should be allowed. The matter is summarily put by Brandeis, J. in United States vs. North American, etc. Co., 253 U. S., 330, at page 334.

But entirely apart from the argument above stated and based upon the language of the statute, there is no resemblance between the war measure of seizing property "believed to be enemy owned" and condemning or otherwise appropriating private property for a public use. We think the difference too obvious to require further discussion.

The general proposition affecting this litigation is accurately stated in the syllabus of United States vs. North Carolina, 136 U. S., 211, viz.: that no sovereign is "liable to pay interest on its debt unless its consent to do so has been manifested by an act of its legislature or by a lawful contract of its executive officers." And the matter was again put in most general terms as to all sovereigns in United States vs. New York, 160 U. S., 598, at page 619.

So far as citations gain importance by similarity of facts, we remain of opinion, despite strenuous argument contra, that the decision in United States ex rel. Angarica vs. Bayard, 127 U. S., 251, presents an almost perfect analogy to the present litigation. There as here the United States Treasury lawfully received moneys, which moneys were lawfully due to one who was apparently a citizen of the United States. There the reason for withholding was a doubt as to

what would be the net proceeds after deduction of expenses. Here the reason for withholding was a doubt as to legal ownership; but in both cases the United States earned money by investing the withheld funds in its own securities. The Supreme Court, by applying the well known doctrine above cited refused to permit Angarica to collect the profit made by the United States.

The law has not changed, and we would be unable to award to Henkels any portion of the money that the United States has acquired by investing his money.

We must and do hold that under the circumstances now revealed, so much of the decree of July, 1921, as required the Treasurer of the United States to pay anything more than the "net proceeds" which Henkels has already received was unlawful. He never could have gotten anything, even if there had never been a receipt and release executed. Consequently the order appealed from is affirmed. No costs.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Jan. 12, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

C. M. H. M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the above named appellant, Max Henkels, by Morris J. Hirsch, his counsel, and feeling himself aggrieved by the order of this Court entered on the 12th day of January, 1925, affirming the decree of the United States District Court for the Southern District

of New York entered on the 23rd day of May, 1924, doth hereby pray that an appeal may be allowed to him from said order to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herewith, and that a transcript of the record, proceedings and papers upon which said order of this Court was made, duly authenticated, be sent to the Supreme Court of the United States.

And said appellant further says that this is a case in which the judgment or decree of the Circuit Court of Apeals is not made final by the provisions of the United States Judicial Code and that the of the United States.

Dated New York, February 20, 1925.

Morris J. Hirsch, Counsel for Appellant. Hirsch, Sherman & Limburg, Solicitors for Appellant, 160 Broadway, Manhattan, New York City.

The foregoing appeal is hereby allowed; bond $250.00.

Dated New York, February 27, 1925.

C. M. Hough, U. S. Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the appellant, Max Henkels, by Morris J. Hirsch, his counsel, and says that the order of this Court in the above entitled appeal entered on the 12th day of January, 1925, is erroneous and that in the record and proceedings and in the order aforesaid manifest error has intervened to the prejudice of said appellant, as follows, to wit:

1. This Court erred in affirming the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924.

2. This Court erred in not reversing the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924.

3. This Court erred in not reversing the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924, and in not remanding this cause to said District Court, with instructions to grant to appellant, the plaintiff in said District Court, the relief prayed for in the plaintiff's notice of motion dated March 20th, 1924.

4. This Court erred in affirming the said decree of the District Court which had denied the application of the appellant which was embraced in the appellant's notice of motion dated March 20th, 1924.

5. This Court erred in affirming the said decree of the District Court which had been equivalent to the dismissal, upon pleadings and proofs, of a supplemental bill of complaint for the same relief as that sought by appellant's motion and prayed for in his notice of motion dated March 20th, 1924.

6. This Court erred in affirming the said decree of the District Court which had refused to grant to appellant any relief in this cause.

7. This Court erred in affirming the said decree of the District Court which had refused to name a master to take and state the account of the defendants, as directed by the decree of July 6th, 1921, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree.

8. This Court erred in affirming the said decree of the District Court which had refused to direct that the accounting directed in and by said decree of July 6th, 1921, should now proceed.

9. This Court erred in affirming the said decree of the District Court which had refused to vacate or set aside so much of the order of January 10th, 1922, for satisfaction of the said decree of July 6th, 1921, and warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and whereon the said order was entered, as satisfies or purports to satisfy said decree of July 6th, 1921, with reference to defendant's duty to account for the income or interest, if any, earned or accrued.

10. This Court erred in affirming the said decree of the District Court which had refused to decree that said warrant for satisfaction of decree and receipt or release, in so far as the same apply to the interest or income mentioned in said decree of July 6th, 1921, were delivered by appellant to appellees involuntarily and under duress.

11. This Court erred in ruling and holding, for the purpose of affirming the decree of the District Court entered May 23rd, 1921, that there was error in so much of the decree of the District Court entered July 6th, 1921, and now sought to be enforced, as is comprised in the words "together with the income or interest, if any, earned thereon."

Wherefore, the said appellant prays that said order of the United States Circuit Court of Appeals for the Second Circuit entered in this cause on the 12th day of January, 1925, be reversed and that the said Court may be directed to enter an order reversing the said decree of the United States District Court for the Southern District of New York entered in this cause on the 23rd day of May, 1924, and directing said District Court to enter a decree in accordance with the prayer of said notice of motion.

Dated New York, February 20th, 1925.

Morris J. Hirsch, Counsel for Appellant. Hirsch, Sherman & Limburg, Solicitors for Appellant, 160 Broadway, Manhattan, New York City.

BOND ON APPEAL FOR $250—Approved and filed Feb. 27, 1925; omitted in printing

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IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 83 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Max Henkels, plaintiff-appellant, against Thomas W. Miller, as Alien Property Custodian, and another, defendants-appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of February in the year of our Lord One Thousand Nine Hundred and twenty-five and of the Independence of the said United States the One Hundred and forty-ninth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

CITATION—In usual form, showing service on Wm. Hayward; omitted in printing

Endorsed on cover: File No. 30,959. U. S. Circuit Court of Appeals, Second Circuit. Term No. 318. Max Henkels, appellant, vs. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America. Filed March 17th, 1925. File No. 30,959.

Supreme Court of the United States

October Term, 1920. No. 318.

MAX HENKEL,

Plaintiff-Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America,

Defendants-Appellees.

BRIEF FOR APPELLANT.

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TABLE OF CASES AND STATUTES CITED.

STATUTES CITED.

EXECUTIVE ORDERS, ETC., CITED.

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Supreme Court of the United States

MAX HENKELS, Plaintiff-Appellant, against THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America, Defendants-Appellees.	October Term, 1925. No. 318.

BRIEF FOR APPELLANT.

APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 12, 1925, AFFIRMING DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MAY 23, 1924, DISMISSING THE APPLICATION OF THE PLAINTIFF IN A SUIT UNDER THE TRADING WITH THE ENEMY ACT.

Reported Below.

In the District Court: 298 Fed. 947.
In the Circuit Court of Appeals: 4 Fed. (2d) 988.

Grounds of Jurisdiction of This Court.

The date of the judgment to be reviewed is January 12, 1925 (Tr., p. 69).

The appeal was prayed for on February 20, 1925 (Tr., p. 70), and allowed on February 27, 1925 (Tr., p. 70). The record was filed on March 17, 1925 (Tr., p. 72).

The record does not show any specific claims advanced or rulings made in the lower Court which are relied on as the basis of this Court's jurisdiction, but appellant, in his brief in the Circuit Court of Appeals, asserted rights under the Fifth Amendment to the Constitution of the United States.

The statutory provisions under which the jurisdiction of this Court is invoked are Judicial Code, Section 241 (Act of March 3, 1911, c. 231, 36 Stat. 1157), giving a right of appeal to or writ of error from this Court in any case in which the judgment or decree of the Circuit Court of Appeals is not made final and in which the matter in controversy exceeds one thousand dollars besides costs, and the same statute, Section 128 (36 Stat., 1133), as amended by Act of January 28, 1915, Chapter 22, Section 2 (38 Stat., 803), making the judgments and decrees of the Circuit Court of Appeals final *only* in cases where jurisdiction is dependent entirely on diversity of citizenship or under the patent, trade-mark, copyright, revenue or criminal laws or in admiralty.

The present case was brought originally in the District Court, pursuant to Section 9 of the "Trading with the Enemy Act," approved October 6, 1917, Chapter 106 (40 Stat., 411), and is therefore not one of the cases made final in the Circuit Court of Appeals under Section 128 of the Judicial Code.

The record shows that the matter in controversy exceeds $1,000, being an accounting of the interest or income on the sum of $1,502,552.55 from March 26, 1919 (Tr., p. 14), to dates of payment of the several installments thereof (Tr., p. 19) at the rate earned on bonds and obligations of the United States, wherein the fund was invested by the Treasury Department (Tr., pp. 41 and 52), i. e., *at least* 3½%, viz.:

On $518,776.27 from March, 1919, to March, 1921: approximately.....	$ 36,000.00
On $110,000 from March, 1919, to April, 1921: approximately.....	8,000.00
On $873,776.28 from March, 1919, to January, 1922: approximately.....	81,000.00
Total in controversy at least.....	$125,000.00

The jurisdiction of this Court in this class of cases was sustained in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554.

Statement of the Facts.

On June 18, 1918, the Alien Property Custodian seized 2,298 shares of the capital stock of International Textile, Inc., a Connecticut corporation, then in the possession of and standing in the name of the plaintiff, upon the claim that the stock in reality belonged to a German firm, to wit: Alb. & E. Henkels of Langerfield, Germany, which was claimed to be an alien enemy (Tr., pp. 3-4, 13).

On March 26, 1919, these shares of stock were sold by the Alien Property Custodian for the sum of $1,518,000, and the amount received from such sale, after deduction of the expenses of sale, was deposited in the United States Treasury (Tr., pp. 14, 22).

Complainant, an *American* citizen, claimed that *he*—and *not* the German firm—was the owner of this stock at the time of the seizure, and duly instituted this suit in equity against the Alien Property Custodian and the Treasurer of the United States under the provisions of Section 9 of the Trading with the Enemy Act of October 6, 1917, Chapter 106 (40 Stat., 411, 419), as amended by the Act of June 5, 1920, Chapter 241 (41 Stat., 977), praying that he be adjudged and decreed to be the owner of said shares and that the Treasurer of the United States account for and pay over to him the net amount realized from the sale, *together with all interest or income earned thereon* (Tr., pp. 6, 13).

The cause was tried on July 5, 1921, before Honorable CHARLES M. HOUGH, Circuit Judge, sitting as District Judge, and resulted in a decree, dated July 6, 1921, in favor of plaintiff (Ex. A, Tr., pp. 21-22). It adjudged that plaintiff was the "sole owner" of the shares in question (Tr., p. 22, fol. 65). The decree thereupon directed as follows (Tr., p. 22):

> "That the defendant Frank White, as Treasurer of the United States of America, be and he is hereby directed to account for and pay over to the complainant the proceeds of the sale of the said 2298 shares of common stock of International Textile, Inc., now in his possession or custody, *together with the income or interest, if any, earned thereon.*"

Prior to the trial, the Treasurer had paid plaintiff $628,776.27 on account. Accordingly, upon the trial before Judge HOUGH the following stipulation was made (Tr., p. 14):

> "IT IS CONCEDED that the property was sold on March 26th, 1919, and realized the sum of $1,518,000.00, from which was deducted for the

expenses of sale, $12,947.45, leaving a balance of $1,505,052.55; from which there was deducted for administration expenses the sum of $2,500.00, which left a balance of $1,502,552.55, of which there has been paid to Mr. Henkels the sum of $628,776.27, leaving a balance in the Treasury of $873,776.28."

The amounts of principal belonging to the plaintiff which had been on deposit in the Treasury were, therefore, in round figures, as follows (Tr., p. 19):

March, 1919, to March, 1921 (two years) ...	$1,505,000.00
March, 1921, to April, 1921 (one month) ...	983,000.00
April, 1921, to payment of principal as hereinafter stated, January, 1922 (nine months)	873,000.00

On August 1, 1921, defendants appealed to the Circuit Court of Appeals from Judge HOUGH'S decree (Tr., p. 15). Plaintiff—the appellee on that appeal—served notice of a motion to affirm or to advance the cause for immediate argument upon the ground that it appeared from the transcript that the questions raised on the appeal were frivolous and did not justify extended argument (Ex. M, Tr., p. 44). Prior to the hearing of such motion, defendants *consented* to the dismissal of their said appeal (Tr., p. 43), and thereupon an order was made by the Circuit Court of Appeals on September 21, 1921, dismissing defendants' appeal upon consent without costs (Ex. N, Tr., pp. 45-46).

After the dismissal of the appeal, the Department of Justice wrote to the Treasury Department to prepare a warrant and check for the conceded amount of the *principal sum* awarded by the decree of this Court (Tr., pp. 47-48), and thereupon, on October 27, 1921, complainant's counsel was advised that the Department of Justice had received from the Treasury a check to complainant's order for the conceded balance of principal, to wit, $873,766.28.

Although the decree of the District Court (Tr., p. 22) had expressly required the Treasurer of the United States to pay over to the plaintiff not only the principal sum due to him but *also* "the income or interest, if any, earned thereon," and although there was no dispute as to the principal amount which was due—such amount having been stipulated upon the trial (see pp. 4-5 of this brief, *supra*)—the Treasurer of the United States declined to comply with the provisions of the decree, and refused to pay over the principal concededly due, unless plaintiff would execute a general release and consent to a satisfaction of judgment, the effect of which would be to relieve the Treasurer from the obligation to pay income or interest as required by the decree.

The plaintiff, after unavailing efforts to induce a more equitable attitude, executed the general release and consented to the satisfaction of the judgment under circumstances which the plaintiff claims constituted duress.

On December 15, 1923, the ALIEN PROPERTY CUSTODIAN made a report to the United States Senate (Ex. L, Tr., p. 40) which disclosed that up to March 4, 1923, the Treasurer of the United States had received and collected the sum of $27,009,812.14 as income earned on the proceeds of property seized under the Trading with the Enemy Act, which had been deposited with the Treasurer by the Alien Property Custodian.

Among the funds so deposited were the funds of the plaintiff. This having been brought to the attention of the plaintiff, he applied to the District Court to set aside the satisfaction of the decree and the general release, in so far as they applied to income or interest, and to name a master to take and state the account of the interest or income, if any, earned upon the principal of plaintiff's fund until its payment to him.

No objection was raised to the procedure of bringing the matter on by affidavits (in lieu of resorting to the more formal procedure of supplemental pleadings and the taking of evidence), a practice finding sanction in decisions of this Court (*Kelsey* v. *Hobby*, 16 Pet. 269; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196).

The District Court denied plaintiff's application and entered a final decree (Tr., pp. 56, 57) dismissing the application. An appeal was thereupon taken to the Circuit Court of Appeals for the Second Circuit, which (Tr., p. 69) affirmed the decree entered in the District Court.

The Opinion of the District Court.

In the District Court, LEARNED HAND, J., *erroneously assumed* that plaintiff had been offered by defendants, and defendants were willing to pay him, interest at the rates *actually* earned through investment of plaintiff's funds in United States securities, but that plaintiff insisted upon payment of interest at the *legal* rate of 6% per annum (Tr., p. 52). Upon *this* basis he reached the conclusion that there was no duress, and having reached this conclusion, did not pass upon the broader question whether an American citizen, whose property had been erroneously seized by the Alien Property Custodian, is entitled to the return, not only of the property seized but also of the income derived from such property while in the possession of the Alien Property Custodian or the Treasurer of the United States.

LEARNED HAND, J.'s assumption above referred to was contrary to the fact. The Alien Property Custodian and the Treasurer of the United States had *not* offered the plaintiff the income *actually* earned by the Treasurer of the United States upon the proceeds derived from the sale

of plaintiff's property. On the contrary, this had been expressly *refused*. They had declined to pay plaintiff *any* interest or income whatsoever (Tr., pp. 15, 48; Exs. D-H, inclusive, Tr., pp. 27-33).

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals declined to pass upon the questions of fact or law involved in the claim of duress. It considered *exclusively* the fundamental vital question whether an American citizen, whose property had been erroneously seized under the provisions of the Trading with the Enemy Act, is entitled to recover the income earned thereon in addition to the principal. The attitude taken by the Circuit Court of Appeals will best appear from the opening paragraphs of the opinion (Tr., p. 66):

> "This bill presents two questions:
> "1st. Can appellant, by his plea of duress, be relieved of the receipt and release executed by him? And, 2d, if such relief be granted, could he recover any more than he has received in this litigation?
>
> * * * * * * *
>
> "Of the two questions above stated we prefer to consider the second, for however interesting the question of duress may be, considering the trend of modern decisions, a judgment here favorable to appellant would leave the second question undetermined, while the second question, if decided adversely to appellant, disposes so far as we are concerned of the whole matter."

Under these circumstances, and in accordance with the decisions cited in Point IV of this brief (*infra*, p. 45), we do not deem it proper to present at this time the questions involved in the claim of duress, inasmuch as the Circuit Court of Appeals declined to pass thereon. Should

this Court find that the Circuit Court of Appeals erred in the determination upon the question of the right to recover income, this Court would, in accordance with its past practice, remand the case to the Circuit Court of Appeals, to have the questions of fact and law involved in the claim of duress reviewed by that Court in the first instance.

Errors Intended to be Urged.

Nos. 1-6, inclusive (Tr., pp. 70-71): Affirmance by the Circuit Court of Appeals of the decree of the District Court, which constituted, in effect, the dismissal of a supplemental bill of complaint and the refusal of any relief whatsoever to the plaintiff-appellant.

Nos. 7-9, inclusive (Tr., p. 71): Affirmance by the Circuit Court of Appeals of the decree of the District Court refusing to vacate and set aside the release and satisfaction of the prior decree of July 6, 1921, so far as appertained to defendants' duty to account for the interest or income, if any, earned upon the proceeds of plaintiff's property, to name a master, and to direct that the accounting should now proceed.

No. 10 (Tr., p. 71): Affirmance by the Circuit Court of Appeals of the refusal of the District Court to decree that the warrant for satisfaction of the prior decree and receipt or release were delivered involuntarily and under duress. (The question of fact was not determined by the Circuit Court of Appeals for the reasons stated *supra*, p. 8).

No. 11 (Tr., p. 71): The determination, in effect, by the Circuit Court of Appeals on the present appeal from the decree of the District Court entered May 23, 1921, that error had been committed in the *prior* decree of the

District Court entered July 6, 1921, by the inclusion in said prior decree of the words "together with the income or interest, if any, earned thereon."

Same Questions Involved in No. 561 on the Docket of This Court.

There is pending before this Court the case of *Kny* v. *Miller*, No. 561 of October Term, 1925, which is an appeal from the Court of Appeals of the District of Columbia (reported in 2 Fed. [2nd] 313) and involves the identical questions.

Summary of the Argument.

Point I—Under the true construction of the Trading with the Enemy Act, an American citizen whose property has been seized by the Alien Property Custodian under the mistaken belief that it was enemy owned, is entitled to the return not only of the property (or of the amount realized from its sale), but also of the income or interest earned thereon or derived therefrom while in the custody of the Alien Property Custodian or of the Treasurer of the United States. Any other construction would render the Trading with the Enemy Act void because in contravention of the Fifth Amendment to the Constitution of the United States. The Trading with the Enemy Act, neither by express language nor by fair inference, permits the Government to retain income derived from property of American citizens erroneously seized.

Subdivisions of Point I:

I, II and III—Statement of the statutory provisions giving the right of seizure, fixing the duty of the

Custodian with respect to property seized and the sale thereof, and the remedy of the owner of seized property.

IV—Practical construction of the Act (1) by the Alien Property Custodian, (2) by the President, and (3) by Congress.

V—The express language of the Act relating to the return of the "property" or its "proceeds" is broad and comprehensive enough to include income or interest earned.

VI—The general rule is that, upon the restoration of property to its rightful owner, the increment is to be deemed a part of the property.

VII—The purpose of the Trading with the Enemy Act was to do full justice to the rightful owner, and there was no intention by Congress to confiscate property.

VIII—All war-time acts which provide for the summary seizure of property of citizens are necessarily to be construed so as to afford such citizens just compensation, including the income or interest derived from the property seized. This is necessary to render the legislation valid under the Fifth Amendment to the Constitution.

IX—Discussion of the authorities relied on by court below and by appellees.

Point II—The Alien Property Custodian and the Treasurer of the United States are trustees for plaintiff, and in consequence may not retain the income derived from the property of their *cestui que trust*.

Point III—The fact that the funds derived from the sale of plaintiff's property were commingled by the Treasurer of the United States with other similar funds cannot deprive plaintiff of his rights.

Point IV—The judgment of the Circuit Court of Appeals should be reversed and the cause remanded to that court to pass upon the issues raised by plaintiff's charge of duress and defendant's denial thereof.

POINT I.

Under the true construction of the Trading with the Enemy Act, an American citizen whose property has been seized by the Alien Property Custodian under the mistaken belief that it was enemy owned, is entitled to the return not only of the property (or of the amount realized from its sale), but also of the income or interest earned thereon or derived therefrom while in the custody of the Alien Property Custodian or of the Treasurer of the United States. Any other construction would render the Trading with the Enemy Act void because in contravention of the Fifth Amendment to the Constitution of the United States. The Trading with the Enemy Act, neither by express language nor by fair inference, permits the Government to retain income derived from property of American citizens erroneously seized.

The right of the Alien Property Custodian to seize property *believed* to be enemy owned can no longer be questioned.

Central Union Trust Co. v. *Garvan*, 254 U. S. 554.
Stoehr v. *Wallace*, 255 U. S. 239.

This right is undoubted, even though it should develop that in any particular case the Alien Property Custodian was mistaken in his belief.

Having regard to the vast amount of enemy property in this country, much of it concealed; to the large number of persons of German origin residing here; to the atmosphere of suspicion which was engendered and inflamed during the progress of the war, it was inevitable that mistakes would be made by the Alien Property Custodian. The statute, as pointed out in *Central Union Trust Co.* v. *Garvan*, *supra*, and *Stochr* v. *Wallace*, *supra*, expressly contemplated the possibility of such mistakes.

In the case of property *actually* enemy owned, the United States, in the absence of congressional action, "could do with it what it liked."

White v. *Mechanics Securities Corp.*, — U. S. —, decided Dec. 14, 1925, 46 Sup. Ct. Rep. 116, 118.

In the case of property *not* actually enemy owned, the situation is different. With such property the United States could *not* "do as it liked." It could not confiscate such property without making just compensation; and this right of just compensation in the event of seizure is clearly accorded by the Fifth Amendment to the Constitution, notwithstanding the existence of war.

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81.

United States v. *New River Collieries*, 262 U. S. 341.

Rockaway Pac. Co. v. *Stotesbury*, 255 Fed. 345.

Cf. *Ex parte Milligan*, 4 Wall. 2.

Let us then see just what the statutory provisions are which purport to protect the rights of one whose property may have been mistakenly seized.

I.

The Right of Seizure under the Trading with the Enemy Act.

This is provided for by Section 7 (c), as amended by the Act approved November 4, 1918, Chapter 201 (40 Stat. 1020), and, as so amended, reading as follows:

> "(c) If the President shall so require, any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act.
>
> * * * * * * *
>
> "The *sole relief and remedy* of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this Act, and in the event of sale or other disposition of such *property* by the Alien Property Custodian, shall be

> limited to and enforced against the *net proceeds* received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." (Italics ours.)

By subsection "(e)" of the same Section 7 it was further provided (40 Stat. 418):

> "(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this Act."

II.

The Duty of the Alien Property Custodian with Respect to Unsold Property Which Has Been Seized, and His Right to Sell Seized Property.

These subjects are provided for by Section 12 of the Trading with the Enemy Act, as in part amended by the Act approved March 28, 1918, Chapter 28 (40 Stat. 450). This section, as so amended, in part provides as follows:

> "Sec. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.
>
> "All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid

to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary, or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury), and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

* * * * * * *

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof. * * * The alien property custodian shall

forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

III.

The Remedy of a Person Whose Property Has Been Seized.

Section 9 (a) of the Trading with the Enemy Act, Act of October 6, 1917 (Chap. 106, 40 Stat. 411, 419), as amended by Acts of July 11, 1919 (Chap. 6, 41 Stat. 35), and June 5, 1920 (Chap. 241, 41 Stat. 977), provided as follows (there was a further amendment after the commencement of the action herein, Act of March 4, 1923, Chap. 285, 42 Stat. 1511, which will be considered hereafter):

> "Sec. 9. (a) That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian or seized by him hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian or seized by him hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require * * *. If the President shall not so order within sixty days after the filing of such application * * * *said claimant may,* at any time before the expiration of six months after the end of the war, *institute a suit in equity in the* * * * *district court* * * * (to which suit the alien property cus-

> todian or the Treasurer of the United States, as the case may be, shall be made a party defendant) *to establish the interest, right, title or debt so claimed*, and if so established, the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States, or the interest therein to which the court shall determine said claimant is entitled." (Italics ours.)

This Court has held that the remedy given under Section 9 is the *exclusive* remedy of the owner of property mistakenly seized, and that such remedy was *designed* to afford *full* protection to such owner by enabling him to secure "just compensation" for the seizure.

> *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554.
> *Stochr* v. *Wallace*, 255 U. S. 239.

This Court did not have before it the question of whether the just compensation involved necessarily *included* income or interest derived from the seized property while withheld from the owner.

IV.

The Practical Construction Given to the Trading With the Enemy Act by the Officials in Charge of It, by the Executive, and by Congress.

(1) *Construction by the Alien Property Custodian.*

Property mistakenly seized by the Alien Property Custodian may consist of cash, stocks, bonds or other property.

(a) If bonds were seized, the coupons collected by the Alien Property Custodian would be placed in a special income account; and when the principal would be returned, the income would be returned with it.

(b) If shares of stock were seized, the dividends upon these shares of stock paid to the Alien Property Custodian were placed in a separate income account, and when the shares would be returned, the dividends paid thereon would likewise be returned.

(c) If improved real estate was seized, the income and rents derived therefrom would be placed in a separate account, and when the principal would be returned, the income would likewise be returned.

(d) It is *only* where the property seized consists of *cash, or has been converted into cash* by the Alien Property Custodian, through the process of sale, that a *different* attitude has been taken, viz., to *retain* the income, though returning the principal.

This practice, which was conceded upon the hearing below and finds recognition in the opinion of the Circuit Court of Appeals (see pp. 20-21, *infra*) and in the opinion in *Kny* v. *Miller*, 2 Fed. (2nd) 313, was not occasioned by any requirement of the statute. On the contrary, the statute, Section 12, heretofore quoted (p. 15, *supra*), clearly authorizes the investment of cash. The $1,518,000 derived from the proceeds of plaintiff's property herein, were invested, it is true, but the reason why the income derived from such investment was not paid to the plaintiff was *merely* that the $1,518,000 were not earmarked in a *special* fund, but were commingled with the proceeds of *other* sold property and with cash seized, and such *commingled* funds invested, instead of individual investments having been made from *each* separate fund. None

the less, upon the books of the Alien Property Custodian each seizure is denominated a *separate trust* and is separately numbered (Tr., p. 122).

Thus the denial of relief to plaintiff was based upon the fortuitous circumstance that the Treasurer of the United States, before investing the plaintiff's funds, commingled the plaintiff's funds with those of others, *which he was in no way required to do;* and from this fortuitous circumstance it is claimed that the result now follows that the United States may *retain* for itself, free from any claim of the plaintiff, the large amount of income which has been earned upon plaintiff's property which had been erroneously and mistakenly seized.

If plaintiff's stock had not been sold by the Alien Property Custodian, plaintiff would have received all the income derived from this stock, even if such income had been declared by way of dividend, while such stock was held by the Alien Property Custodian; but because this particular asset belonging to plaintiff was not maintained in kind, as the Alien Property Custodian was authorized to do, but was converted into an asset of a different character, i. e., in the first instance into cash, and thereafter into Liberty bonds, the position is now taken that the plaintiff has been deprived of the right to be paid the income which was earned upon his property while withheld from him, and that such income may be *retained* by the United States.

The opinion of the Circuit Court of Appeals recognizes the Departmental practice. The opinion states (Tr., pp. 65-66):

> "It is now agreed that the Custodian never received any dividends on the stock *prior* to sale. Whatever profits or advantages resulted to anyone from the stock or its proceeds arose because in com-

pliance with Section 12 of the Act (40 Stat., 423), the Secretary of the Treasury had invested most of all the moneys realized from sales of property seized by the Custodian, in the securities of the United States yielding interest. There was never any such investment of the *specific* sum obtained from the sale of Henkels' stock or any other *particular* lot of seized property. Nor had the Secretary invested all the money so received by him from the Custodian, because there was kept on hand a cash balance of approximately five million dollars at all times to provide for obvious possible contingencies. But from the investment of the major portion of the moneys realized from Custodian's sales there had accrued in the Treasury of the United States prior to March 4, 1923, the sum of twenty-seven million dollars (Document No. 10, Senate, 68th Congress, 1st Session).

"To some equitable portion of this income, interest or increment Henkels laid claim under the decree above recited." (Italics ours.)

Whatever may be the legal rights of the United States to retain this income and to deprive the plaintiff thereof, there will, we take it, be no attempt to justify its position in point of equity or morals.

A further consideration, however, may be appropriate at this juncture. What is there in the Trading with the Enemy Act which justifies the Treasurer of the United States or the Alien Property Custodian in paying dividends received or coupons or rent collected, which does not *equally* justify or require the payment of interest earned on the proceeds of sale?

(2) *Construction by the Executive.*

Executive Order No. 2813 signed by the President February 26, 1918, "Prescribing Rules and Regulations Respecting the Exercise of the Powers and Authority and

the Performance of the Duties of the Alien Property Custodian Under the 'Trading with the Enemy Act,' and Prior Executive Orders Pursuant Thereto, and Respecting the Deposit and Investment of Moneys Received by or for the Account of the Alien Property Custodian," contains the following, among other things:

"(5) DEPOSIT AND INVESTMENT OF MONEYS RECEIVED BY THE ALIEN PROPERTY CUSTODIAN.

"There shall be deposited in the Treasury of the United States, through the office of the Secretary of the Treasury—

"(a) Any and all moneys (including checks and drafts payable on demand) paid to or received by the Alien Property Custodian pursuant to the 'Trading with the Enemy Act';

"(b) Any and all moneys (including checks and drafts payable on demand) collected or received by the Alien Property Custodian, as dividends or interest or income that may become due upon any stocks, bonds, notes, time drafts, time bills of exchange, or other securities or property held by the Alien Property Custodian or by any depositary or depositaries designated as provided in said Act for the account of the Alien Property Custodian;

"(c) Any and all moneys collected as the proceeds of any and all maturing obligations held by the Alien Property Custodian or by any such depositary or depositaries for the account of the Alien Property Custodian; and

"(d) Any and all moneys paid to or received by the Alien Property Custodian as the proceeds of any sale or sales, made at any time pursuant to such rules and regulations as the President shall prescribe, of any and all property or rights which shall come into the possession of the Alien Property Custodian in pursuance of the provisions of said act.

* * * * * * *

"Any and all moneys so deposited in the Treasury of the United States, as herein provided, as well as all moneys, if any, which may be paid to the Treasurer of the United States, as provided in section 12 of said act, and all interest, dividends or other income, if any, in respect of any property conveyed, transferred, assigned or delivered to the Treasurer of the United States as provided in said section 12, shall be credited by the Treasurer of the United States to the Secretary of the Treasury *'for account of the Alien Property Custodian.'*

"Any and all money so deposited in the Treasury of the United States, as herein provided, together with any *interest or income received from the investment thereof*, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said act, and, until so withdrawn, *may be invested and reinvested*, from time to time, by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness. The bonds and certificates of indebtedness, in which such moneys shall be so invested, shall be held by the Secretary of the Treasury *for account of the Alien Property Custodian*, subject to the provisions hereof and of said act and to such further orders, rules or regulations as may, from time to time, be prescribed by me." (Italics ours.)

It will be noted in this Executive Order that the income was to be credited "for account of Alien Property Custodian." It is further to be noted that not only money deposited with the Treasurer but also *"any interest or income received from the investment thereof"* was to be subject to withdrawal by the Secretary of the Treasury "for the purpose of making any payment or payments pursuant to the provisions of said Act." *The only payments provided for by the Act, however, were the claims of citizens and other non-enemies under Section 9*

(*supra*, p. 17). It is further to be noted that the bonds and certificates of indebtedness in which the money was to be invested were likewise to be held "for account of the Alien Property Custodian, subject to the provisions hereof and of said Act," etc.

It is evident from the above language that there was no thought in the Executive's mind that the income derived from the investment of cash was to be treated differently than the cash itself. There was no idea in the Executive's mind that this income was to be *retained* by the United States of America. On the contrary, the fact that it as well as the principal were to be credited and held "for the account of the Alien Property Custodian" indicates clearly that in the matured opinion of the Executive such income was something which the Alien Property Custodian was, in turn, accountable for under the terms of the Trading with the Enemy Act.

(3) *Construction by Congress.*

The Departmental construction that the Trading with the Enemy Act requires the return not only of principal, but of income collected (which is not applied in the present instance merely because by reason of the commingling of funds the income is claimed not to be identifiable), has received the express sanction of Congress. By the so-called Winslow Act (approved March 4, 1923, Chap. 285, 42 Stat. 1511), Section 9, subsection (b) of the Trading with the Enemy Act was amended, among other things, by adding paragraphs "(9)" and "(10)" to provide that citizens of Germany, Austria, etc., whose property had been seized, and whose property so seized, or the proceeds thereof, exceeded $10,000, should be entitled to the return of $10,000 of such property so seized, or the proceeds thereof; and Section 9, subsection (i) of the same Act provided that

> "For the purposes of paragraphs (9) and (10) of sub-section (b) of this section *accumulated net income, dividends, interest, annuities, and other earnings shall be considered as part of the principal*" (42 Stat. 1515). (Italics ours.)

This provision is clearly significant of the intention of Congress that the "*property*" of anyone seized—which in the case of enemies was to be held for future Congressional action, and in the case of non-enemies was to be returned as the result of demand or judicial action—was to be considered not merely as the principal, or corpus of the property seized, but was to include the income, dividends, or earnings accumulated thereon or derived therefrom while in the custody of the Alien Property Custodian or the Treasurer of the United States. It is to be remembered that the identical provisions of the Trading with the Enemy Act refer to the proceeds of the sale of enemy property and to the proceeds of the sale of property of American citizens erroneously deemed to be enemy property.

Under the construction given to the Act by the Courts below, therefore, the American owner, whose property had been seized by mistake, is in a worse position than if he were actually an enemy and his property had been taken.

There is nothing, we submit, in the Act which prevents the Treasurer of the United States from paying over the income earned from the investment of cash realized from the sale, and, on the contrary, we submit that the Act required him so to do. The question of the commingling of the proceeds of property of various persons sold raises no *legal* question as to either *rights* or *obligations*. It raises merely a question of *accounting*. There is obviously no inherent difficulty in ascertaining the average rate of in-

terest which has been earned on all funds comprised within this general fund, and allocating to each share in that fund its proportionate share of such interest (see Point III, *infra*).

V.

The Express Language of the Trading With the Enemy Act, Relating to the Return of the "Property" or Its "Proceeds," Is Broad and Comprehensive Enough to Include Income or Interest.

At this point we may more particularly note the exact language of the statute.

Section 9 (a), quoted *supra* (p. 17), authorizes a suit to establish the "interest, right or title" of a claimant in and to "money or property" which has been seized by the Alien Property Custodian. The term "money" as used in that section clearly has reference to money which may have been seized, *not* to money derived from any *sale* of property seized. This is shown by the context.

However, in the case of a sale prior to the institution of suit, it is provided by Section 7 (c), quoted *supra* (pp. 14-15), that "the remedy provided by the terms of this Act" [i. e., the remedy provided by Section 9 (a)] "shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

What then is included within the term "property" as used in Section 9 (a) and within the term "proceeds" as used in Section 7 (c)?

(1) The term "property" is "a generic term of extensive application" (32 *Cyc.* 647). It is said to be "*nomen generalissimum.*"

Boston etc. Corporation v. *Salem R. R. Co.*, 2 Gray (Mass.) 1, 35.
Wilson v. *Beckwith*, 140 Mo. 359, 373.
Rossetter v. *Simmons*, 6 Serg. & R. (Pa.) 452, 456.

It includes not merely possession of the *res* but all rights in and over the *res*, such as the rights of user, exclusion and disposition.

Dixon v. *People*, 168 Ill. 179, 190.

See also:

Eaton v. *Boston R. R. Co.*, 51 N. H. 504, 511.
Chicago R. R. Co. v. *Englewood R. R. Co.*, 115 Ill. 375, 385.

The statute, Section 9 (a), permits the claimant expressly to establish his "interest, right and title" to the "property." The rights of plaintiff in and to the stock seized by the Alien Property Custodian were not merely the rights to the physical possession and ownership thereof, but they *included* his right exclusively to enjoy and receive the income to be derived therefrom. Such right within all the definitions constitutes "property" and has frequently been classed as such within the meaning of the Fifth and Fourteenth Amendments to the Constitution.

(2) The word "proceeds," as used in Section 7 (c), is no less comprehensive. It is a "word of great generality."

Phelps v. *Harris*, 101 U. S. 370, 380.

It is a word of "equivocal import. Its construction depends upon the context."

Thomson's Appeal, 89 Pa. St. 36, 45-46.
Armour Packing Co. v. *London*, 53 S. C. 539, 543.

It is a word "of loose and varying significance."

Kidwell v. *Ketler*, 146 Cal. 12, 21.

It has frequently been construed to denote or include income.

Hunt v. *Williams*, 126 Ind. 493.
Birmingham v. *Lesan*, 77 Me. 494, 497.
Gibbs v. *Barkley*, 242 S. W. 462, 465 (Tex., 1922; not officially reported).
Thomson's Appeal, supra.

VI.

As a General Rule, Upon Restoration of Property to Its Rightful Owner, the Increment Is to Be Deemed to Be a Part of the Property Originally Taken.

While the decisions hereinafter referred to are not claimed to be controlling in the case at bar, they at least constitute pertinent analogies which may be invoked as an aid to the proper construction of the statute.

Where personal property is taken from the real owner, it is the general rule that the increment, accruing while such property is withheld, is to be deemed a part of the property taken and must be returned with it. It has been so held with respect to the increase of live stock and the children of slaves in cases of failure of title due, for

example, to default by a conditional vendee, a sheriff's error in levying, or the making of a void lease by a farmer's widow under the belief that as widow she possessed the powers of an administratrix and guardian.

Foster v. *Gorton*, 5 Pick. (Mass.) 185.
Jordan v. *Thomas*, 31 Miss. 557.
Buckmaster v. *Smith*, 22 Vt. 203.
Phipps v. *Martin*, 33 Ark. 207.
Williamson v. *Daniel*, 12 Wheat. 568, 570.

VII.

In Construing the Trading With the Enemy Act, There Must Be Borne in Mind Both That Its Purpose Was to Do Full Justice to the Rightful Owner, and, on the Other Hand, That There Was No Intention by Congress to Confiscate Property.

It is elementary that a Federal statute must be construed in the light of the manifest purpose of Congress. The Court should endeavor to give effect to the intention of Congress. Unless absolutely required by its language, no act should be construed so as to give to it an effect contrary to what was intended. No citation of authorities is necessary in support of these elementary principles.

It must be assumed that Congress had the Fifth Amendment to the Constitution in mind when it enacted the Trading with the Enemy Act. It must be assumed, therefore, that what Congress intended to provide was *just and adequate compensation.* Particularly is this so, because the true owner whose property was taken was deprived by the very terms of the statute of the ordinary remedies of injunction, ejectment, replevin and even of a right of

action against the erring officer to recover damages for the trespass. These would be at his command in the event of the enactment of a peace statute which purported to permit his property to be taken without just compensation.

Meigs v. *M'Clung's Lessee*, 9 Cranch. 11, 18.
Mitchell v. *Harmony*, 13 How. 115
Tweed's Case, 16 Wall. 504, 518-519.
U. S. v. *Lee*, 106 U. S. 196.
Concession in the Solicitor General's Brief in *U. S.* v. *North American Co.*, 253 U. S. 330.

It is, of course, unthinkable that Congress should have intended the confiscation of *American*-owned property. But we go further. The debates and public documents indicate that it was not intended to confiscate even *enemy* property. The Act was one having for its purpose the conservation of property during the war, not its confiscation.

See:

Report No. 85, to accompany H. R. 4960, House of Representatives, 65th Congress, First Session.
Hearing before Sub-Committee of Committee on Commerce, U. S. Senate, 65th Congress, First Session, on H. R. 4960, pp. 131-132.
Senate Reports Nos. 111 and 113, 65th Congress, First Session, to accompany H. R. 4960.

In the last mentioned reports, it is expressly stated, among other things (p. 9), that "the theory on which the bill is drafted is that enemy property shall be protected and utilized but *not confiscated.*"

On November 14, 1917, Mr. Palmer, the then Alien Property Custodian, issued Official Bulletin No. 159, which was expressly approved by the President, in which he stated,

referring to enemy property: "There is of course *no thought of the confiscation* or dissipation of the property thus held in trust."

Conceding for the sake of argument that Congress had the power to order confiscation of enemy property, it must be presumed that Congress had in mind not only the past political history of this country but the statement of Chief Justice MARSHALL in *Brown* v. *U. S.*, 8 Cranch. 110, 128, that no nation could (even in 1814) exercise such a power "without obliquity," and that Chief Justice MARSHALL in *U. S.* v. *Percheman*, 7 Pet. 51, deemed the confiscation of private property to be illegal, and that in *Hanger* v. *Abbott*, 6 Wall. 532, the Court referred to the right of confiscation of enemy property "as a naked and impolitic right not contemplated by the enlightened conscience and judgment of modern times." This was written in 1868.

If this be the history of our judicial utterances, expressive of the conscience of the American nation with respect to the confiscation of enemy-owned property, surely it must be held that Congress distinctly did *not* intend the confiscation of property owned by American citizens. Yet, unless the Act be construed to provide for the return of the income, as well as of the principal of property seized by the Alien Property Custodian, it clearly provides for confiscation.

VIII.

All War-Time Acts Which Provide for the Seizure of Property of American Citizens Are Necessarily to Be Construed so as to Afford Such Citizens Full Compensation, Including the Income or Interest Derived From the Property Seized.

The Fifth Amendment to the Constitution is not self-executing, for, despite its adoption, the Federal courts have adhered to the English common law rule that the sovereign cannot be sued without its consent, and that, if sued, the extent of the recovery must be within the limits of the statute authorizing suit, whether or not this would afford full and adequate compensation.

U. S. v. *Lee*, 106 U. S. 196, at 205-209.
Schillinger v. *U. S.*, 155 U. S. 163.
Basso v. *U. S.*, 239 U. S. 602.
U. S. v. *North American Co.*, 253 U. S. 330.

Where property has been seized or is about to be seized by some agency or official of the Government, the owner of the property must in the first instance consider whether a statute purports to authorize such seizure. If the seizure be unauthorized by statute, the Government would not be liable because the act would be a tort merely of the individual officer (*Tracy* v. *Swartwout*, 10 Pet. 80; *Tweed's Case*, 16 Wall. 504, 518-519). If, on the other hand, a *peace time* statute purported to authorize the seizure, then there would be raised, by implication of law, the obligation of the Government to pay for the property. This is an implied "contract" of the Government upon which Congress has by statute given permission to sue in the

Court of Claims, or, if the amount be less than $10,000, in the District Court without a jury. Such permission, however, is to sue merely for the principal. It does not authorize the recovery of interest. While equitably it might be said that the Government should pay interest in such cases, the harsh rule of the common law is adhered to, viz., that as the Government has not consented to be sued for interest, there is no jurisdiction in the Court to hold it beyond the letter of the statute.

The true owner of property is, however, not without remedy. He can invoke the Fifth Amendment by asserting that a seizure which does not provide full compensation to him (and full compensation necessarily either includes interest or else implies that the payment of compensation be concurrent with the taking) is in violation of the Fifth Amendment to the Constitution. If such seizure be threatened, he may enjoin it. If it has been effected, he may invoke the remedies of replevin or ejectment, whichever may be appropriate in the case. His action, of course, would be not against the United States, but against the officer personally, and it would include recovery of the income derived from the property while unlawfully detained or damages for its detention.

In the case of *war-time statutes* the situation is different. If the seizure of privately owned property becomes necessary for the proper prosecution of war, it stands to reason that the Government's *attempted* seizure should not be restrained pending the ascertainment and payment of just compensation. To do so would frustrate the very purposes of such statutes and render them impotent and nugatory. Therefore, in the Trading with the Enemy Act, it is provided that the remedy given under Section 7 (c), *supra*, is **exclusive**, and it has been expressly decided by this Court that the Alien Property Custodian may *not* be enjoined from taking possession of property by the claim—

even if true—that the property is not enemy owned (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239). Moreover, Section 7 (e) of the Trading with the Enemy Act (40 Stat. 418; p. 15, *supra*) expressly deprives the true owner of any cause of action against any *officer* of the Government who may be concerned with the taking of the property.

Having thus relegated the owner to a single specific remedy, it is essential that this remedy be construed in the light of the Fifth Amendment.

A similar situation has arisen under *Section 10 of the Lever Act* and under the *Emergency Shipping Act*. In each of those acts there was provision for the seizure of property of American citizens by officers of the Government, in the interest of the successful prosecution of the war. By each of those acts an exclusive remedy was given to the true owner. It was provided that he might sue the Government in the one instance in the District Court, and in the other instance under Judicial Code, Sections 24 (20) and 145, to recover "just compensation" for the property taken. Under those acts the character of the property to be taken is such that it would presumably be used by the Government. Consequently, it could not be returned in its original condition nor its value determined by a sale made thereof by the Government, for it was not intended to be sold but to be used. Therefore, those acts use the general phrase of awarding "just compensation."

Neither in the *Lever* Act nor in the *Emergency Shipping* Act was there an *express* provision awarding interest or income; but this Court held that the broad language used must be construed so as to include such award.

Seaboard Air Line v. *U. S.*, 261 U. S. 299.
Brooks-Scanlon v. *U. S.*, 265 U. S. 106, 123.
Campbell v. *U. S.*, 266 U. S. 368, at 370-371.

In the Trading with the Enemy Act, however, it was contemplated either that the *specific res* would remain intact to be returned or that it would in the meantime be sold. The sale was to conclusively fix its value *as of the time of sale.* The amount realized would include payment for any increment in value arising *between the taking and the sale.* Therefore, the Trading with the Enemy Act used the phraseology of "property" and "proceeds" and of "interest, right and title" of the owner thereof, as distinguished from the language "just compensation" used in the Lever Act and Emergency Shipping Act. *But the purpose of all these acts was the same. It was to afford the true owner just compensation, and this necessarily involved that he be awarded interest or income, as the case may be.*

IX.

The Authorities Relied on by the Appellees Considered.

In the Court below the appellees relied on

Kny v. *Miller*, 2 Fed. (2nd) 313,

a case in which the identical question is involved and which is No. 561 now on the calendar of this Court.

The other authorities primarily relied on were:

U. S. v. *North American Co.*, 253 U. S. 330.
U. S. v. *North Carolina*, 136 U. S. 211.
U. S. v. *New York*, 160 U. S. 598.
U. S. ex rel. Angarica v. *Bayard*, 127 U. S. 251.

All of these cases turn upon the general proposition that the sovereign cannot be sued without its consent;

that in the case of suit to recover damages for breach of a contract, express or implied, interest is not recoverable in the absence of express statutory authorization for such recovery; and in those actions which were brought in the Court of Claims, there was further emphasized the fact that the jurisdiction of that court expressly *excludes* an award of interest, unless such interest has been provided for by statute (*Judicial Code,* Sec. 177; Act of March 3, 1911, Ch. 231, 36 Stat. 1141).

It is respectfully submitted that these decisions are not in point. There is *not* pending here any action *at law* against the sovereign to recover interest for *breach of contract* upon the theory of damages for delay. The recovery sought is of income derived from plaintiff's *own* property; the primary basis for such recovery is that the *statute,* correctly interpreted, authorizes and provides for such payment. If this be so, interest would be recoverable even if the action were brought in the Court of Claims.

Brooks-Scanlon Co. v. *U. S.,* 265 U. S. 106.

In none of the cases cited except *Kny* v. *Miller, supra* (which is of no greater authority than the decision below), was there involved a *war time* statute.

In *U. S.* v. *North American Co.,* 253 U. S. 330, it was conceded by the solicitor general in his brief that the statute involved being a peace time statute, the plaintiff whose property was taken could have invoked the remedy of injunction. The solicitor general, in support of this concession, cited:

Meigs v. *M'Clung's Lessee,* 9 Cranch. 11.
Wilcox v. *Jackson,* 13 Pet. 498.
Brown v. *Huger,* 21 How. 305.
U. S. v. *Lee,* 106 U. S. 196.
Scranton v. *Wheeler,* 179 U. S. 141.

The person whose property was there taken had a *choice of remedies.* He could procure an injunction which would secure him not only in the possession of the *res* itself, but also in the income to be derived from the *res;* or he could bring an action against the Government upon the basis of the implied contract to compensate, in which event, however, he was not entitled to recover interest based upon any delay in paying such compensation. (As a matter of fact, as shown in the opinion of this Court, the delay in that case was primarily the fault of the *owner* of the property.)

There is no analogy between that case and the one at bar. Here under the *war time* statute the plaintiff had *no* choice of remedy. His action *in equity* under the Trading with the Enemy Act was his *exclusive* remedy. In other cases, under *war time* statutes, in essentials not differing from the TRADING WITH THE ENEMY ACT, this Court has held that the rule laid down in *U. S.* v. *North American Co., supra,* has no application.

> *Seaboard Air Line* v. *U. S., supra,* 261 U. S. 299.
> *Brooks-Scanlon* v. *U. S., supra,* 265 U. S. 106, 123.

This discussion disposes likewise of:

> *U. S.* v. *North Carolina, supra,* 136 U. S. 211, and
> *U. S.* v. *New York, supra,* 160 U. S. 598.

It likewise disposes of the case primarily relied on by the appellees.

> *U. S. ex rel. Angarica* v. *Bayard,* 127 U. S. 251.

It may, however, not be amiss to observe that in that case there was never taken any property *belonging to the complainant.* The complainant's claim was against *Spain.*

The United States entered into a treaty with Spain, as a result of which *Spain paid to the United States* a certain amount in settlement of the claims of American citizens against it. The income earned upon the payment received by the United States from Spain *never* was any income *derived from complainant's property.* The money received from Spain was the *property of the United States* when received. True, the United States had a moral obligation to distribute the fund received by it among the claimants for whose benefit, in part, it had negotiated the treaty, but its obligation was obviously of a wholly different character from the obligation that it owes to its citizens when it takes their property.

X.

Conclusion.

It is respectfuly submitted, in conclusion, that the true intent and meaning of the Trading with the Enemy Act is that the American owner whose property was erroneously seized should have full and adequate compensation, and that such compensation necessarily would include the income or interest derived from his property while withheld from him. This construction is not only justified by the language of the Act, and by its practical interpretation, but is required so as to save it from invalidity under the Fifth Amendment to the Constitution.

POINT II.

The Alien Property Custodian and the Treasurer of the United States are trustees for plaintiff, and in consequence may not retain the income derived from the property of their *cestui que trust.*

Section 6 of the Trading with the Enemy Act expressly provides that the Alien Property Custodian, with respect to money and property coming into his possession, is to "hold, administer and *account for* the same under the general direction of the President and as provided in this Act" (Act of Oct. 6, 1917, Ch. 106, Sec. 6; 40 Stat. 415).

On November 14, 1917, the Alien Property Custodian issued an official bulletin, approved by the President, which we have quoted (pp. 30-31, *supra*), which in referring to property seized by the ALIEN PROPERTY CUSTODIAN, stated:

> "There is, of course, no thought of the confiscation or dissipation of the property thus *held in trust.*"

The WINSLOW ACT, approved March 4, 1923 (Ch. 285, 42 Stat. 1511), amends Section 9 of the Trading with the Enemy Act by authorizing the return of not exceeding $10,000 of the principal of each of the separate "*trusts*" of property seized by the Custodian. Property seized by the Alien Property Custodian or proceeds thereof is in Section 9 (h) (42 Stat. 1515) described as constituting a "*trust.*" The WINSLOW ACT also adds new sections to the Act. Section 23 (42 Stat. 1516) directs the Custodian to pay

> "to the person entitled thereto * * * the net income * * * accruing and collected thereafter on

> any property or money *held in trust for such person* by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian * * *."

Section 24 (42 Stat. 1516) authorized the Custodian to pay taxes and expenses incurred in securing possession or protecting or administering the property out of the money or property involved, or, if that be insufficient, "out of any other money or property *held for* the same person."

Thus, Congress expressly intended that seizure by the Alien Property Custodian should result in the creation of a trust relationship. This likewise has uniformly been recognized by the officials having the administration of the statute in charge. Ever since the enactment of the TRADING WITH THE ENEMY ACT, every seizure of property has been designated by the Alien Property Custodian as a "trust."

In the opinion of the Circuit Court of Appeals it is intimated that there is a distinction between the position of the Alien Property Custodian and of the Treasurer of the United States respectively towards plaintiff (Tr., p. 68), but we submit that the alleged distinction is non-existent. The Treasurer of the United States holds the funds, or the securities in which they are invested, "for the account of" the Alien Property Custodian and pursuant to the Act. (See the language of the statute quoted pp. 15-16 and Executive Order, quoted pp. 22-23 of this brief, *supra.*) Obviously, therefore, his position is no different from that of the Alien Property Custodian. If the Alien Property Custodian be a trustee, the Treasurer of the United States receives funds from such trustee *with knowledge of the trust relationship.* The trust character of such a holding cannot be lost by such a transfer where there is knowledge by the transferee of the trust relationship.

Nor can there be any distinction in the trust relationship between property seized and its proceeds. A trustee

cannot divest himself of his responsibility by disposing of the trust property. It is an elementary principle of law that the trust relationship attaches to the proceeds of trust property sold by the trustee.

We do not believe that it is necessary to dilate at length upon this feature of the case, for only recently in *U. S. v. Chemical Foundation, Inc.*, this question was most fully presented to this Court and is now under advisement. In that case counsel representing the United States, *with respect to enemy property*, took the same position which we are asserting in the case at bar with respect to *American* owned property. We therefore content ourselves upon this branch of the case with referring this Court to the arguments and authorities and analysis of the statute advanced in that case.

One suggestion in the Circuit Court of Appeals, however, should be briefly noted. It is stated in the opinion (Tr., pp. 66, 67):

> "Appellant's proposition is that the Custodian became a trustee for Henkels in respect of this stock and its proceeds. It is now adjudicated that there was never any right to seize the stock, wherefore the Custodian must respond, like any other trustee who has made profit out of the fund for which he is held ultimately responsible.
>
> "It is undoubtedly true that in a certain sense the Custodian is a trustee. He is called by that name in the 12th section of the Act (40 Stat. 423), and he has called attention to his trusteeship for the public at the bar of this and many other Courts.
>
> "But if appellant's theory of attack be considered closely it is clear that the trusteeship that he invokes as against the Custodian is one arising ex maleficio. It is a trusteeship created by a wrong; and that wrong was a seizure of property belonging to an American citizen and unaffected by enemy ownership.

> "The niceties of the law of torts have not been and cannot be strictly regarded in statutes passed under the stress of war and designed to meet war conditions."

It is submitted that plaintiff is not under the necessity of maintaining that defendant is a trustee *ex maleficio*, though there would appear to be no reason for denying plaintiff relief if the defendants *were* held to be trustees *ex maleficio*.

The trust, we submit, is primarily one *created by the statute*. The opinion of the Circuit Court of Appeals says (Tr., p. 67):

> "But this much is, we think, clear, that it can never be said that by reason of conduct such as occurred in this case of Henkels the Custodian became a trustee for Henkels in the same sense that he would have become a trustee under a deed *inter partes*, or by reason of an actionable wrong."

We submit that the trusteeship was created not by reason merely of the *conduct*, i. e., the seizure, but by the *very terms of the act*, which imposes upon the seizure, rightful or wrongful, the character of a trusteeship for the benefit of the real owner.

But if it were necessary to term the trusteeship one *ex maleficio*, even this would be no bar to plaintiff's recovery. Such a designation does not necessarily involve an intentionally wrongful act. The transaction, however, is more properly to be termed a constructive or implied trust. Such relation is created or implied in law in the case of a mistaken seizure, just as it is in the case of an unintentional tortious seizure.

Smith v. *Orton*, 131 U. S., Appx. lxxv.
McKee v. *Lamon*, 159 U. S. 317.
Order of St. Benedict v. *Steinhauser*, 234 U. S. 640.
Chicago, &c., Ry. v. *Des Moines, &c., Ry.*, 254 U. S. 196.

Assuming even that in the case of property actually enemy owned a trust would exist only by reason of the obligations imposed by the statute, we submit that in the case of a seizure of property of an American citizen mistakenly taken for that of an enemy, the trust relation has been imposed *both* by the provisions of the statute, and independent of the statute, from the very fact that the Alien Property Custodian has taken possession of property *not* belonging to an enemy, which he is bound to return to the true owner.

Whatever obligations this relation may or may not impose upon the Alien Property Custodian, or the Treasurer of the United States, we submit that *it is unthinkable that it authorizes him either individually or in a representative capacity to make a profit out of the property which he has erroneously seized.*

POINT III.

The fact that the funds derived from the sale of plaintiff's property were commingled with other funds cannot deprive plaintiff of his rights.

If after the sale of plaintiff's shares of stock and payment by the Alien Property Custodian to the Treasurer of the United States of the amount realized from the sale, the latter had kept an accurate account of the investment

of this *particular* fund in Liberty bonds, there can, we believe, be no doubt that plaintiff would be entitled to the proceeds of the interest coupons on the bonds. Similarly, if every dollar of Custodian money in the hands of the Treasurer had been invested in government bonds at one uniform rate of interest, there would be no difficulty in saying that each fund owner was entitled to the interest at that rate. However, as pointed out in the opinion of the Circuit Court of Appeals (Tr., p. 65) it was the practice of the Treasurer to leave at all times several million dollars uninvested as a working cash balance. Accordingly, it is claimed by the Treasurer that he has rendered it impossible to determine that any *particular* owner's moneys were either invested or uninvested.

In such cases, however, the law does not permit justice to be defeated by the fortuitous circumstance that administrative officers have failed to keep proper records or make proper segregation of each fund, but decrees that each party, who is entitled to relief, shall receive his aliquot proportion of the entire increment. The situation is analogous to that of the commingling of property of any nature.

Intermingled Cotton Cases, 92 U. S. 651.
The Distilled Spirits, 11 Wall. 356.
Great Southern Co. v. *Logan Co.,* 155 Fed. 114, cert. den. 207 U. S. 590.
Duel v. *Hollins,* 241 U. S. 523, 529.

POINT IV.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded to that court to pass upon the issues raised by plaintiff's charge of duress and defendant's denial thereof.

As pointed out in our discussion of the opinions of the District Court and of the Circuit Court of Appeals (pp. 7-8, *supra*), the District Judge decided adversely to plaintiff's claim of duress and dismissed the application, and the Circuit Court of Appeals declined to review or in any wise pass upon that issue, basing its decision upon the proposition of law that plaintiff has no right to the income earned by the defendant Treasurer.

We understand it to be the settled practice of this Court under such circumstances, that, if this Court determines that the Circuit Court of Appeals was in error upon the question of plaintiff's right to the earned income, the cause should be remanded to the Circuit Court of Appeals with instructions to consider the questions of fact and law which were presented by the charge of duress and the traverse thereof, and which that court expressly declined to consider.

Gerdes v. *Lustgarten*, 266 U. S. 321, 327-328.
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257.
Brown v. *Fletcher*, 237 U. S. 583.

Dated, March 5, 1926.

Respectfully submitted,

HENRY L. SHERMAN,
HERBERT R. LIMBURG,
HARRY F. MELA,
Counsel for Appellant.

CONTENTS

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 318

MAX HENKELS, APPELLANT

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, and Frank White, as Treasurer of the United States of America

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES

PREVIOUS DECISIONS IN THIS CASE

The opinion of the Circuit Court of Appeals (R. 65) is reported in 4 F. (2d) 988. The opinion of the District Court has not been reported but will be found on page 51 et seq. of the record.

GROUNDS FOR THE JURISDICTION OF THIS COURT

This case is before this Court upon an appeal from a judgment of the Circuit Court of Appeals for the Second Circuit, dated January 12, 1925 (R. 69), which affirmed a decree of the District Court

of the United States for the Southern District of New York dated the 23rd day of May 1924 (R. 56).

The appeal has been prosecuted pursuant to Section 241 of the Judicial Code (c. 231, 36 Stat. 1157). The suit was instituted in the District Court pursuant to the provisions of Section 9 of the Trading with the Enemy Act as amended June 5, 1920 (c. 241, 41 Stat. 977). The provisions of the Judicial Code respecting appeals are made applicable to suits under Section 9 of the Trading with the Enemy Act by Section 17 of that Act (c. 106, 40 Stat. 425).

STATEMENT OF THE CASE

The plaintiff a citizen of the United States instituted his suit in the District Court to recover from the Alien Property Custodian and/or the Treasurer of the United States, the proceeds of the sale of 2,298 shares of the common capital stock of the International Textile, Inc., a Connecticut corporation, which had been seized by the Alien Property Custodian as the property of Alb. & E. Henkels, enemies, and later sold and the proceeds of the sale deposited in the Treasury of the United States. The stock had been sold by the Custodian for $1,518,000. Prior to the institution of the suit part of this sum had been paid to the plaintiff pursuant to Executive action and there remained in the Treasury of the United States of the proceeds of the sale, the sum of $873,776.28, which the plaintiff claimed should also be paid to him.

Plaintiff was successful in his suit and on July 6, 1921, a decree was entered which directed that the Treasurer of the United States " account for and pay over to the complainant the proceeds of the sale of said 2,298 shares of the common stock of the International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon."

Thereafter the sum of $873,776.28 was paid to the plaintiff by the Treasurer of the United States and on the 28th day of November, 1921, he gave a receipt and release with respect thereto (R. 34), and a warrant for satisfaction of the final decree was executed by his counsel (R. 37). On January 10, 1922, an order satisfying the decree was entered in the District Court (R. 39).

Under date of March 20, 1924, over two and a half years after the entry of the final decree in the case and over two years after the entry of the order satisfying the decree, the plaintiff served notice upon the Alien Property Custodian and the Treasurer (R. 10) that a motion would be made for an order naming a master to take and state the account of the defendants for income or interest, if any, earned on the proceeds of the sale of the stock covered by the final decree; vacating and setting aside so much of the order satisfying the decree and warrant for satisfaction upon which it was entered as purported to satisfy the decree with reference to the defendants' duty to account for the

income or interest, if any, earned or accrued; and vacating and setting aside so much of the receipt of the plaintiff as released or purported to release the Alien Property Custodian and the Treasurer from liability to account for income or interest.

The plaintiff contended in the District Court that interest had been earned by the Custodian upon the principal amount recovered by the plaintiff, which interest he was entitled to receive; that the receipts and releases and the warrant for satisfaction of the decree had been secured from the plaintiff by duress in that payment of the principal sum had been refused unless a complete receipt and release was executed. As to whether or not interest had been earned it appeared that the proceeds of the sale of the plaintiff's stock had been deposited in the Treasury of the United States by the Alien Property Custodian, pursuant to the provisions of Section 12 of the Trading with the Enemy Act (c. 106, 40 Stat. 423), together with a large amount of other enemy owned money (R. 19, 40, 41) a portion of which aggregate sum had been invested by the Secretary of the Treasury pursuant to Section 12, supra, in interest-bearing Government securities.

It was the contention of the plaintiff that he was entitled to recover a portion of the interest accrued upon the said securities. The District Court denied plaintiff's motion on the ground that the final decree of July 6, 1921, was interlocutory and that under that decree plaintiff was not immediately entitled to the payment of the sum for which

he gave the receipt, and was therefore not unlawfully kept out of his money, the statute giving him the option, and only that, to take what defendants would agree to give in final settlement, or to prosecute the account to final decree. (R. 51, 54.)

On appeal from the order of the District Court the Circuit Court of Appeals (R. 65) passed over all questions of duress and went immediately to the question as to whether or not plaintiff would be entitled to recover any of the interest even assuming the proceedings were reopened. The Circuit Court of Appeals held that the plaintiff was not entitled to receive any interest and, therefore, affirmed the decree of the District Court.

The defendants do not press as a defense the fact that the plaintiff executed a complete receipt and release at the time the principal amount involved was paid to him, or the fact that an order satisfying the final decree was entered. It is desirable to have the question of law as to the right to recover the interest in such a case as this decided for their guidance in similar cases.

THE QUESTION INVOLVED

The question involved in this case is whether or not a citizen of the United States, whose property has been mistakenly seized by the Alien Property Custodian, sold, and the proceeds of the sale deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act, with enemy money, some of which is invested

in Government securities by the Secretary of the Treasury, is entitled to recover in a suit under Section 9 any of the interest accrued upon the said securities.

There is no question involved in this case of the right of a claimant under Section 9 of the Trading with the Enemy Act to receive all income derived from his property while in the custody of the Alien Property Custodian. The defendants concede and have never disputed the right of a proper claimant under Section 9 of the Trading with the Enemy Act to recover all income earned on his property while in the custody of the Government other than the interest accumulated on Government securities in which the Secretary of the Treasury has invested cash deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act. The question here is whether interest that is payable by the United States is recoverable.

SUMMARY OF ARGUMENT

Section 12 of the Trading with the Enemy Act requires the Alien Property Custodian to pay all cash into the Treasury of the United States. The Secretary of the Treasury is given the discretionary power of investing such cash in Government securities. A portion of the cash thus deposited in the Treasury of the United States, of which aggregate amount cash belonging to the appellant formed a part, was invested in interest bearing

Government securities. The appellant, who was entitled as an American citizen to recover his principal which has been paid him is not entitled to recover any of the interest thus accumulated, because such a payment to him would constitute the payment of interest by the United States upon one of its obligations when there is no statutory authorization for such payment.

The statute allows recovery only of the net proceeds of sale of seized property, without interest.

The fact that the proceeds of the sale of appellant's property was invested in interest-bearing Government securities does not change the situation, since the payment of the interest on the securities to the appellant would constitute an indirect payment of interest by the United States upon its obligation. *United States ex rel Angarica* v. *Bayard*, 127 U. S. 251.

There was no taking for public use under the power of eminent domain and the rule in such cases requiring payment of interest from the date of the taking to the date of payment of compensation is not applicable.

ARGUMENT

IN THE ABSENCE OF STATUTE NO INTEREST CAN BE RECOVERED UPON AN OBLIGATION OF THE UNITED STATES

The plaintiff's property was seized by the Alien Property Custodian pursuant to the terms of Subsection (c) of Section 7 of the Trading with the

Enemy Act, which is as follows (c. 106, 40 Stat. 418):

> If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

Plaintiff's property was sold by the Alien Property Custodian pursuant to the provisions of Section 12 of the Trading with the Enemy Act as amended March 28, 1918 (c. 28, 40 Stat. 460), which provides:

> The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or be-

> come appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof; *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct.

The funds realized from the sale of the plaintiff's property the Custodian was required by Section 12 of the Trading with the Enemy Act to deposit in the Treasury of the United States (c. 106, 40 Stat. 423). This Section provides as follows:

> That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regula-

> tions as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the *war as the President shall deem practic*able, such securities shall be sold and the proceeds deposited in the Treasury.

As will appear from these statutes the Alien Property Custodian is not the custodian of any money which may come into his possession either upon demand by him or as the result of the sale of property under the Act, after it is deposited in the Treasury. Money must be paid into the Treasury of the United States. The fact that the Alien Property Custodian is not the custodian of money is emphasized by the fact that Section 9 of the Act as amended June 5, 1920 (c. 241, 41 Stat. 978), under which this suit is brought, provides that "the Alien Property Custodian *or* the Treasurer of the United States, as the case may be, shall be made a party defendant." This clearly shows that Congress had in mind that the Alien Property Custodian was to be the custodian of property, whereas money was to be deposited in the Treasury of the United States, and the Alien Property Custodian was to have no control whatsoever over it. In order for money to be secured by a claimant the Treasurer must be a party to the suit in order that the decree as to money may run against him.

The money which represented the proceeds of the sale of plaintiff's property was deposited in the Treasury of the United States and became inter-

mingled with enemy money which had been so deposited. (R. 19, 40, 41.) By Section 12, supra, the Secretary of the Treasury is given permission (he is not required so to do) to invest and reinvest the money paid into the Treasury of the United States.

Exercising the authority conferred upon him the Secretary of the Treasury invested some of the funds, not all of them, of which the money representing the sale of the plaintiff's property was a part, in interest bearing Government securities. Plaintiff insists that he is entitled to recover a portion of such interest. Section 7–c as amended November 4, 1918 (c. 201, 40 Stat. 1021), provides:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and *in the event of sale or other disposition* of such property by the Alien Property Custodian, shall be limited to and enforced against *the net proceeds received therefrom* and held by the Alien Property Custodian or by the Treasurer of the United States. (Italics ours.)

It will, therefore, appear that the plaintiff's right to recover is in any event limited to the net proceeds of the sale, which do not include interest upon such proceeds.

More important, however, is the fact that to permit the recovery by plaintiff of any portion of the interest accumulated upon the securities in which general enemy funds had been invested will mean the payment of interest by the United States. The Trading with the Enemy Act makes no provision for the payment to claimants of interest upon funds which have been wrongfully or mistakenly seized.

It has been the law for many years that the United States, in the absence of statute, can not be compelled to pay interest upon its obligations. In the case of *United States* v. *Rogers*, 255 U. S. 163, 169, this Court said:

> It is unquestionably true that the United States upon claims made against it, can not, in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

This principle is dealt with more at length in the case of *United States* v. *North American Company*, 253 U. S. 330, 336, where this Court said:

Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), can not be attributed to the sovereign. *United States* v. *North Carolina,* 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman,* 98 U. S. 565, 567–568. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits although relieved from the payment of interest on the charges against it. *United States* v. *Verdier,* 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby,* 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp,* 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.,* 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

It is clear that had the Treasury of the United States held the deposited funds invested there would be no obligation to pay interest. The fact that acting under statutory authority the Secretary of the Treasury invested the funds in obligations of the United States Government does not alter the situation, for it is the United States Government which would be called upon to pay the interest upon the securities. The real effect of the statutory authority given was to authorize the Treasury to make use of the moneys deposited with it under the provisions of the Trading with the Enemy Act, a war measure.

That interest will not be paid by the United States in such an indirect way is clearly demonstrated by the case of *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251, and it is submitted that the decision in that case clearly disposes of the plaintiff's case. In that case a petition for a writ of mandamus was presented to the Supreme Court of the District of Columbia by the relator. The Supreme Court of the District of Columbia dismissed the petition and from the judgment of dismissal an appeal was taken. The facts of the case were that on February 12, 1871, an agreement was concluded between the United States and Spain for the settlement of certain claims of the United States. Pursuant to the agreement arbitrators and an umpire were appointed, and a commission thus composed was established. The relator had filed

a claim before the commission, and the commission had decided that the relator was entitled to approximately $750,000 with interest thereon at 6% per annum from November 1, 1875, to the date of payment. The amount of the award to the relator had been paid to the Secretary of State of the United States and the Secretary of State had paid over to the relator the entire amount, except approximately $41,000. The $41,000 was 5% of the amount received and was retained by the Secretary until the Government of Spain should make provision for paying the expenses of the commission. The money was retained by the Secretary of State until payment to cover the expenses of the commission had been made by Spain in conformity with the provisions of the agreement of February 12, 1871, between the United States and Spain.

The money thus retained by the Secretary of State was invested in Government securities. Later Spain made provision for the expenses, and the Secretary of State paid to the relator the $41,000, which he had retained but did not pay any interest or income which had been earned by reason of the investment of the $41,000 in Government securities. The money while with the Secretary of State had been invested pursuant to Section 2 of the Act of September 11, 1841 (c. 25, 5 Stat. 465), which prescribed that " all funds held in trust by the United States, and the annual interest accruing

thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum." (The similarity between this provision and the provision in the Trading with the Enemy Act as to investment must be noted.) It was to compel the Secretary of State to pay over the interest accrued on the fund of $41,000 that the petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia in the case.

The Court held, in the first place, that if there was any unlawful withholding from the petitioner the money was withheld by the Government of the United States acting through the Secretary of State, and any claim of the petitioner based upon an unlawful withholding was *a claim against the Government of the United States.* Continuing, the Court said (p. 259):

> That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld; *but the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money.*

The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the Government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

This appears from a succession of the opinions of the Attorneys General of the United States, given by Attorneys General Wirt, Crittenden, Legare, Nelson, Johnson, Cushing and Black, and appearing in the following volumes and pages of those opinions, as published: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449.

Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because Congress, though well knowing the rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment

of interest on claims against the Government. Such statutes for the payment of interest as have been passed, apply to specific cases enumerated in the several statutes, and do not cover the present case.

The principle above stated is recognized by this court. In *Tillson* v. *United States,* 100 U. S. 43, 47, this court, speaking of the rule that interest is recoverable between citizens if a payment of money is unreasonably delayed, says that with the Government the rule is different, and that the practice has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for. See also *Gordon* v. *United States,* 7 Wall. 188, and *Harvey* v. *United States,* 113 U. S. 243, 248, 249.

No claim for the allowance of interest can be predicated in this case upon the language of any notification or circular or letter which issued from the Department of State. No binding contract for the payment of interest was thereby created, and the present Secretary was at liberty to act on his own judgment in the premises, irrespective of anything contained in any such notification, circular, or letter. (Italics supplied.)

It is submitted that, assuming the most favorable state of facts in the present case to the plaintiff, the *Angarica case* completely disposes of the present case in favor of the defendants. An effort is made on page 37 of plaintiff's brief to distinguish the *An-*

garica case. The plaintiff says that the claim in that case was predicated upon an alleged withholding of money recovered from the Spanish Government by the United States acting in behalf of its citizens under a treaty, and that the claim was originally and truly against the foreign Government in the collection of which the United States offered a helping hand. In the first place, no distinction can be made because of the fact that the United States in the present case came into the money of the plaintiff's deceased by a wrongful seizure and withheld the same and the fact that the money in the *Angarica case* was simply wrongfully withheld.

Furthermore, the contention of the plaintiff that the claim in the *Angarica case* was a claim against a foreign Government is unsound. After the money was collected by the United States there was no claim against a foreign government, and the Court held that the claim was against the United States for wrongful witholding. It is respectfully submitted that there is no distinction upon principle whatsoever between the present case and the case of *Angarica* v. *Bayard*.

The principal contention of the plaintiff that the United States should pay interest upon the claim here is founded upon the analogy of condemnation proceedings by the United States, and on the claim that, in condemnation proceedings, interest is awarded from the time of the taking to the time of payment as a part of just compensation for the tak-

ing of a citizen's property. It is further asserted that unless interest is paid by the United States upon the present claim the Fifth Amendment of the Constitution is being violated in that just compensation for the taking is not being fully made. This argument is manifestly fallacious. The United States did not take the property of the plaintiff under any theory of condemnation. It was taken as a war measure under the mistaken belief that it was the property of an enemy. The taking by the United States was under a claim of right, adverse to the owner, and tortious. If a statute is not present to permit the taking in condemnation proceedings by the United States the act of taking becomes merely a trespass by the individual who assumed to act for the United States. *United States* v. *Lee,* 106 U. S. 196. This is also brought out in the case of *United States* v. *North American Co.,* 253 U. S. 330.

The United States, it is true, has had the use of appellant's money, and there may be a moral obligation to pay for that use, but so there is in any case where the United States owes money and does not pay it promptly. The remedy in such cases is with Congress, not in the courts, and until Congress authorizes the payment of interest the courts can not award it.

Upon the general point as to the right to recover interest from the United States see also *United States* v. *Sherman,* 98 U. S. 565; *United States* v. *Verdier,* 164 U. S. 213; and *United States* v. *North Carolina,* 136 U. S. 211.

CONCLUSION

It appears, therefore, from the foregoing that the plaintiff is not entitled to recover any of the interest accrued upon Government securities in which money paid into the Treasury of the United States under the Trading with the Enemy Act is invested.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
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IRA LLOYD LETTS,
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DEAN HILL STANLEY,
Special Assistant to the Attorney General.

APRIL, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1925.

Max Henkels, Appellant, *vs.* Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America.	Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[May 24, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit in equity, under § 9(a) of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 419, as amended by c. 6, 41 Stat. 35 and c. 241, 41 Stat. 977, brought by Henkels, a citizen of the United States, in the federal district court for the Southern District of New York, to recover the proceeds of the sale of 2,298 shares of common stock of International Textile, Inc., a Connecticut corporation, theretofore seized by the Alien Property Custodian upon the claim that it was the property of an alien enemy. A decree was rendered in Henkels' favor, adjudging him to be the sole owner of the stock; and the Treasurer of the United States was directed to account for, and pay over to Henkels, the proceeds of the sale "together with the income or interest, if any, earned thereon." There was realized from the sale of the stock, made on March 26, 1919, after deducting expenses, a balance of $1,505,052.55. This amount the Treasurer paid to Henkels. Subsequently, Henkels applied to the district court to name a master to take and state the account of interest or income earned upon the fund prior to its payment. The application was denied and a final decree of dismissal entered upon the ground that the principal sum had been paid to Henkels, who had executed a release and satisfaction in full which the court refused to set aside on the claim of duress. 298 Fed. 947. Upon appeal, the circuit

court of appeals, without passing upon this ground, held that the United States was not liable for income resulting from an investment of the funds in its own securities. 4 Fed. (2d) 988.

The proceeds arising from the sale of the stock were deposited with the Treasurer in conformity with law; and by that officer they were commingled with the proceeds of other sales of alien property and invested in interest-bearing securities of the United States. The Government admits Henkels' right to recover income earned on the corporate shares prior to their sale, but denies his right to recover for interest actually paid on Government securities in which the proceeds had been invested. This presents the only question for our determination, the Government having expressly waived the point upon which the district court decided the case.

No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case. *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245.

By Executive Order No. 2813 of February 26, 1918, made pursuant to law, moneys deposited with the Treasurer by the Custodian are to be held by the Secretary of the Treasury "for account of the Alien Property Custodian", and may be invested and reinvested from time to time in bonds or United States certificates of indebtedness. All moneys so deposited, together with interest or income received from the investment thereof, are made subject to withdrawal by the Secretary of the Treasury for the purpose of making payments pursuant to the provisions of the Trading with the Enemy Act, which would include, of course, payments under § 9(a).

Section 9(a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right or title in the property seized. If, in the meantime, the seized property has been sold, the same remedy, by § 7(c), as amended, c. 201, 40 Stat. 1020, becomes available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." No distinction in this respect is made between the property and its proceeds. It cannot be doubted that, if the seized property had been securities of the United States and these, thereafter, had been held in their original form, maturing

coupons for interest would have belonged to the American claimant equally with the body of the bonds. In principle, there can be no difference between such a case and the one here, where claimant's property had been converted into securities of the United States. Such securities constitute the statutory "net proceeds," and, by the clear import of the statute, claimant's rights in respect of such proceeds are not inferior to his rights in respect of the original property. And no distinction fairly can be made between the accumulated interest upon securities constituting the proceeds, in the one case, and like securities constituting the property, in the other.

The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are to be held, for the account of the Alien Property Custodian.

With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit, *White* v. *Mechanics' Securities Corporation*, 269 U. S. — (decided December 14, 1925); but it has no such latitude in respect of the property of an American citizen. Whether the Government shall pay interest upon its obligations depends upon Congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

The Government contends that *Angarica* v. *Bayard*, 127 U. S. 251, is to the contrary, and the court below so held. In that case, the suit was for interest or income realized upon the amount of an award in favor of Angarica paid by the Spanish Government to the United States. This court, in denying the right of recovery, applied the general rule of immunity from interest, saying (pp. 259-260) that the claim "is not different in character from what it would have been if, instead of being a claim for increment or in-

come actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money." Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment.

Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, after deducting proper charges and expenses and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. Compare *The Distilled Spirits*, 11 Wall. 356, 368-369; *Intermingled Cotton Cases*, 92 U. S. 651, 652-653; *Duel* v. *Hollins*, 241 U. S. 523.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.